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ABSTRACT

Many changes have taken place on campus due to court decisions, statutes, and accompanying guidelines. This document presents and discusses judicial decisions and trends and their implication for and application to the posture of academic decision making. Discussed is: (1) how colleges and universities, through their catalogs, brochures, handbooks, etc. can possibly be accused of misleading the prospective student; (2) the legal aspects of current student issues; (3) the "Buckley Amendment" as an opportunity for constructive change in higher education; (4) the implications of public support for private higher education; (5) legal issues in faculty employment, ranging from initial employment to dismissal of faculty for reasons of financial exigency, and outlining minimum due process procedures concerning faculty employment; and (6) legal liability, both under civil rights laws and actions in tort. (Author/KE)

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THE LAW AND CONSTRUCTIVE CHANGE

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edited by

D. Parker Young

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INTRODUCTION

During the past few years, much change has taken place on campus due to court decisions and statutes with accompanying guidelines. Higher education administrators must constantly be aware of these changes and must be ready to make appropriate implementation of them. This can afford an opportunity for constructive change.

In order to aid those involved with the administration of higher education, the Institute of Higher Education and the Center for Continuing Education jointly sponsored the conference "Higher Education: The Law and Constructive Change" on June 23–24, 1975. The central purpose of the conference was to present and discuss judicial decisions and trends and their implication for and application to the posture of academic decision making. The issues of concern were questioned and examined not from a philosophical or sociological point of view but in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication.

Dean Robert Yegge ponders the ramifications of a drift toward an enforced accountability in his look at "Consumerism and the Quality of Higher Education." He points out how colleges and universities, through their catalogs, brochures, handbooks, etc., can possibly be accused of misleading the prospective student. The attempts at treating higher education as a target for consumer action are, according to Dean Yegge, couched in one fundamental principle––the holding that higher education is a consumer product. He then points out that higher education may not be a "fungible good or a product for which one shops comparatively." He concludes by stating, "The Constitution protects intellectual freedom, and although we may recognize a protectable right to quality in education, the means of enforcing quality may not properly be found among the precepts of consumerism. Recognition of this distinction is vital to the protection of the intellectual environment."

Dean Donald Gehring and I join together in presenting an overview of the legal aspects of current student issues. Dean Gehring points out that many students are frustrated due to a lack of knowledge of what the courts have said concerning issues involving students.

"The Buckley Amendment" presents an opportunity for constructive change in higher education. In discussing the amendment, Sheldon Steinbach presents a behind-the-scenes look at its development and revision. In addition to pointing out the various provisions and ramifications of the amendment, he also underscores the "lessons" to be learned by way of the dynamics involved in the evaluation of the amendment.

Dean Lindsey Cowen addresses the topic of "Public Support for Private Higher Education" and points out that it is clear that there is substantial support for such aid. He points out that ". . . the only really substantial problems in getting public support for private higher education institutions which are truly secular in nature are political ones." The possible implications of this support are traced, and the fact that the degree of control over private institutions is increased with any increase in public financial support is also noted. Dean Cowen's ultimate conclusion is that ". . . public support for private higher education can be obtained; the political and legal problems can be overcome. But in the end, the question remains: 'Do we really want it?' "

John Carlson outlines the legal issues in faculty employment, ranging from initial employment to

dismissal of faculty for reasons of financial exigency. He outlines what may be termed as minimum due process procedures concerning faculty employment.

A deep concern of all administrators is that of their legal liability, both under civil rights laws and actions in tort. Particia Hollander explores this liability and points out that the next five to ten years will be a time of heavy testing of individual rights under various statutes and of the liability which administrators may incur relative to those statutes.

Changes are indeed occurring today in higher education. Some are dramatic, while others are more subtle. But any change should hopefully be constructive. To aid administrators in this process was the purpose of our conference.

D. Parker Young
Institute of Higher Education
University of Georgia

CONSUMERISM AND THE QUALITY OF HIGHER EDUCATION

Robert B. Yegge
Dean, College of Law, University of Denver

Our legal system is undergoing creative change as the development of a new social and legal phenomenon--consumerism--gathers momentum. The consumer is gaining a voice; with that voice the classical trappings of political power in the formulation of legal concepts are emerging. The new consumerism, seen in the latter part of the last decade by the underfunded and often misinterpreted consumer advocacy of Ralph Nader, is today manifest in a formalized federal consumer protection structure and by the many public advocacy organizations. The consumer has gained significant access to the legal system and has been benefited by far-reaching protective regulations and laws.

Underpinning the new consumerism is the doctrine that "all things not demonstrably true may be false; and falsehood must be extirpated whenever the behaviour of any consumer conceivably might be adversely affected by its continued existence."[1] Thus, "puffing" in advertising designed to generate consumer demand, whether touting the nutritional benefits of a breakfast food composed primarily of air and sugar, or the social benefits which accrue to the proud owner of that other luxury car, must today be supportable by the touter.

Representations of quality made in respect to a particular product, indicates the new consumerism, must be accurate and not misleading. The marbles have been removed from the soup, and the alluring promises of social success have disappeared from the soap commercials.

The issue facing us here today involves the extent to which these concepts have permeated the ivory tower. If, as I noted in my last presentation to the institute,[2] the issues in higher education are moving toward the questions of quality, then do representations about the quality of education fall prey to consumer analysis? If so, then the educational "product" must be defined and the implications for the educational consumer must be examined.

Although the expansion of the concept of fundamental rights to education has been checked, at least temporarily, by the Supreme Court in the case of **San Antonio Independent School District** v. **Rodriguez**,[3] the courts are continuing to toy with the issue. The Court, in a recent expulsion case, **Goss** v. **Lopez**,[4] suggested that education, once made available, may be a property right and as such is protected by minimum standards of due process. The Court said: "Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education is a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedure required by that Clause."[5] If such a due process standard is imposed on available education, then it is a short step to the support of minimum standards of quality for available education as an equal protection argument. I submit that if the now dormant new equal protection doctrine is activated by a change in the tenor of the Court, the quality of education issue may be favorably regarded.

However, is there a conceptual difference between a constitutionally recognized right to a minimum standard of quality in education and the enforcement of that right through the mechanism of consumerism? Within the consumer model, consider education as a product. Although not a tangible good, education is skill development. Development of the processes of thought and analysis is a goal of education. The facts and rules which are taught serve as the vehicles which carry the processes into being. A student is educated and is himself a component of the final product; but, is he only an empty shell into which we pour useless, relevant information or is he part of the raw material which we mold into an education being? However viewed, as a process or as a package, education is the product which institutions of higher learning purvey.

A product, in the consumer scheme, once identified, must be marketed. Colleges and universities expend great sums on promotional literature, catalogues, brochures, handbooks. This advertising contains numerous representations and revelations. College catalogues contain course descriptions which purport to describe the content of particular courses and promise the presence of particular professors. Most colleges and universities embellish their official descriptive literature with thinly veiled promises of enrichment and success, economic if not cocktail conversation. Even more significant are representations about numbers of students, academic or other qualifications for admission, and the professionalism and caliber of the faculty.

A few years ago, the courts were besieged with discipline and expulsion cases arising out of the active era of student protest. The result, which has not been seriously damaged by recent interpretations, was the re-emphasis of the contractual relationship between the student and the college. Although **Dixon v. Alabama State Board of Education**[6] did violence to the practice of arbitrary dismissals of students, at least at state institutions, by imposing minimum due process requirements, the underlying contract analysis remains intact. The representations made by institutions through catalogues, therefore, arguably become part of the contract between student and college. The student has equal rights as a party to the contract to seek its enforcement against the college. Indeed, any documents or representations which fall within the ambit of the contractual relationship and which have been prepared by the college will be strictly construed against it. Thus, education as a product is packaged, marketed, and sold under offers to contract with consumers, the students.

Consider a statement found in a major law school Bulletin: "The curriculum of the College is structured to provide all students with an effective general legal background. Students take traditional courses on which the courts of the United States examine for admission to the practice of law. . . ." Under consumer contract analysis, is there here a guarantee, implicit if not explicit, that the graduated law student-consumer will be equipped to pass the bar examination? Indeed, might the consumer have an action under a warranty of fitness theory if he fails the bar, arguing that the educational product was demonstrably defective?

Consider also the course descriptions contained in most college catalogues. They tend to be worded in enticingly descriptive language tending more to obscure than to enlighten. As a random example: "**Legislative process.** The dynamics of the legislative process, stressing those aspects of special concern to lawyers as practitioners and legislative leaders. Legislative oversight of administrative behavior, investigations statutory drafting; role of the legislature as an instrument of social and political change." An exciting statement, but one with the substantive content of the nutritional information on the back of a bag of potato chips. Does the consumer have the right to demand full disclosure? My colleague Walter J. Blum at the University of Chicago Law School views the answer as follows:

> Such an advance, I fear, will pose a difficult question of ethics for those of my colleagues who never get beyond the first chapter of the casebook they purport to use. Relief in this area might have to rely heavily on the use of interrogatories and discovery procedures to ascertain what in fact they teach--and this

development causes some members of the faculty embarrassment. A simpler solution would be to cut down on the size of casebooks by an arbitrary seventy-five percent. This, incidentally, would bring them back to the sensible norm which prevailed when I was a law student.[7]

If the new consumerism succeeds in efforts to invade the educational domain, educational institutions must protect themselves from liability arising from potential breach of contract or breach of warranty. Mere disclaimer in the body of the contract may be insufficient. The contract for the sale of the educational product has not been bargained for, but is thrust upon the unwitting consumer in trade for the right to matriculate (and pay tuition). Any disclaimer in such a contract could arguably be unconscionable and of no avail to the institution. Must catalogues and bulletins, then, explicitly avoid the implications of warranty by not promising success, passage of the bar examination, or placement after graduation. Clearly they must, if the consumer model is valid in the educational context.

From the institutional standpoint, protection from potential actions for breach of contract or breach of warranty may require extensive restructuring of current norms. Tenure and affirmative action programs are prime examples of danger areas. Must the catalogue reflect the deteriorating competence of an aging professor or require continuing demonstrations of competence as a criterion for continuing tenure? Should the product description define the effects of creeping senility to avoid a warranty of fitness action?

The affirmative action program is particularly threatening to the consumer conscious institution. Must the bulletin reflect that certain faculty members or certain students are not as competent or as able as the disclosed standards for hiring or admission indicate? The new consumerism mandates that universities re-examine tenure and affirmative action programs to avoid potential liability to the dissatisfied consumer. Otherwise, contentions that the educational product is not as purported or is defective might be valid consumer complaints.

Having identified the potential imposition of the consumerism model on the higher education market, one may structure a regulatory scheme to meet the demands of the consumer. The regulation by the federal government of environmental concerns provides an excellent example. Consider, however, not merely the physical environment; the Federal Communication Commission regulates the broadcast environment and thereby affects the social, economic, and intellectual environments, purportedly in the public interest. When the FCC considers an application for license renewal, it investigates the manner in which the applicant has served its assigned broadcast area--the applicant's environment. The FCC questions the quality of the applicant's programming as it relates to some nebulous conception of the public interest, which must be defined in reference to the needs of the local consumers. The renewal will be granted or denied on the basis of this examination.

Turning from speculation to current fact, a **public** educational institution must justify its actions within the context of its environment, defined by the region served and the mandates of the legislature, to gain annual funding support. The legislative investigation resembles the FCC regulation of applications for renewal.

The private institution is not immune from the potentials of encroaching consumer regulation. Granted, it has been judicially established: "The protection of substantive and procedural constitution rights inaugurated by **Dixon** has not been extended to private universities. The 14th amendment refers only to denials of due process or equal protection by the states, and in the absence of 'state action,' the amendment's prohibitions are inapplicable."[8] Nevertheless, the nexus between the state and the private university has become more evident as the activities and financial structure of such institutions are more closely examined.

The Commission on Private Philanthropy and Public Needs, better known as the Filer Commission, has examined the implications of tax incentives in the philanthropic field. Among the issues which the commission has discussed are contentions by critics of the charitable deduction

provisions of the Internal Revenue Code that charitable contributions are really indirect government aid, since they are monies which would have been Treasury income but for the allowance of the deduction. Therefore, institutions receiving such contributions are in effect quasi-public and should be subject to "state action." The tax-exempt status of private colleges and universities permits such institutions to retain funds which would otherwise be paid to the government, lending additional support to the quasi-public characterization. A recent Fifth Circuit opinion tentatively indicates that the conclusions of the Filer Commission have legal validity and, in a proper case, would permit the extension of "state action" to charitable institutions.[9]

The system of private accreditation of public and private educational institutions is relied upon by the federal government for the purposes of determining funding eligibility. The present use of specific standards, albeit privately determined, as the basis for the distribution of federal funds resembles a scheme for the measurement of quality in education. As then Secretary of H.E.W. Elliot Richardson noted in 1971: "Accrediting associations are functioning today in a quasi-governmental role, and their activities relate closely to the public interest."[10] A minor expansion of the notions of accreditation and consumerism coupled with the increasing dependence upon the federal pocketbook by private institutions leads one to the inescapable conclusion that a form of federal regulation of private institutions currently exists. The argument has been extended to conclude that the federal government has the responsibility to assume control of accreditation,[11] thereby creating positive regulation of public and private educational institutions.

These developments lead one to question the extent to which education should be regulated as a consumer product, either directly by government or indirectly by the tenets of consumerism. If the foregoing analysis of education as a consumer product is accurate and justifiable, then regulation shall follow. However, is the environment which higher education serves a market controlled by consumer demand? Or does higher education meet the needs of a different kind of environment? Also, are different classes of educational products to be treated differently (i.e., Proprietory Schools vs. Institutions of Higher Education)? Can we accept regulation of the intellectual environment with the concommitant irreparable harm which it would inevitably mean for intellectual freedom? If not, then the consumer model is inapplicable to the higher educational environment.

The flaw in the consumer model analysis is not in the logic of the argument, which is defensible, but in the major premise. Higher education may not be a fungible good or a product for which one shops comparatively; yet the consumer model imposes such a view upon us. If higher education is merely training or the acquisition of a set of facts and rules, then "diplomas should be made of paper that will disintegrate in ten years."[12] Because the facts and rules are only transitory elements which aid in the educational process, the trade union concept of egalitarianism may have no bearing on intellectual development. What are our ultimate educational goals in higher education?

Intellectual freedom lies at the foundation of our educational system. The Constitution mandates, through the protection of the freedom of speech, an identical protection of intellectual freedom. **Education** operates within the framework of the intellectual environment: the realm of ideas divorced from regulatable enterprises.

When Moses stood at the Red Sea, he engaged in a conversation with God, asking that the waters be separated to permit the Jews to escape to freedom. God replied that He would do so, saying: "Moses, I shall part the turbid waters, but you have to write the environmental impact statement." Einstein identified the theory of relativity forty years before man applied it to his physical environment. Should Einstein have filed an environmental impact statement in 1913, or been subject to regulation because of the potential impact of his theory?

Great ideas reach far beyond the constraints of the physical, social, or economic environments. Can

we treat ideas as we treat consumer goods? Can we regulate the intellectual environment as we regulate the physical environment? The pursuit of higher education is not analagous to the purchase of an automobile or television set. These are the products of ideas. Although the product resulting from an idea may fall within the demands of consumer protection, the production of the idea lies without.

The Constitution protects intellectual freedom, and although we may recognize a protectable right to quality in education, the means of enforcing quality may not properly be found among the precepts of consumerism. Recognition of this distinction is vital to the protection of the intellectual environment.

FOOTNOTES

1. W. Blum, The New Consumerism and the Law School, 3 (Occasional Paper from the Law School, the University of Chicago, 1975).

2. R. B. Yegge, "An Updated Constitutional Crisis--The Undergraduate Education," in **Higher Education: The Law and Institutional Response**, 3–9 (D. P. Young, ed., 1973).

3. **San Antonio Independent School Dist. v. Rodriguez,** 411 U. S. 1 (1972).

4. **Goss v. Lopez,** _____ U. S. _____, 95 S. Ct. 729 (1975).

5. **Id.** at 736.

6. **Dixon v. Alabama State Board of Education,** 294 F.2d 150 (1961).

7. W. Blum, supra note 1.

8. Note, Judicial Review of the University-Student Relationship: Expulsion and Government, 26 **Stan. L. Rev.**, 95, 101 (1973).

9. **Jackson v. Statler Foundation,** 496 F.2d 623 (5th Cir., 1975).

10. H.E.W. Report on Licensure and Related Health Personnel Credentialing, 14 (1971).

11. See M. W. Finkin, Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulation, 2 **J. L. and Ed.**, 339 (1973).

12. Address by Charles S. Jones, "Meeting the Needs of a Rising Economy," Annual Meeting of the Texas Mid-Continental Oil and Gas Association, October 20, 1965.

LEGAL CONCERNS OF STUDENTS AS OPPORTUNITIES FOR CONSTRUCTIVE CHANGE

Donald D. Gehring
Dean of Student Development
Mars Hill College

The topic of this session, "Current Student Issues--An Overview," implies to me two dimensions. These are (1) the concerns students have with the current legalistic era and (2) what the courts are saying about legal confrontations between students and their institutions. These dimensions are obviously related, since what concerns students eventually finds its way into the courts, giving rise to judicial pronouncements. However, there is a subtle difference between the two, and more attention to what problems students have with the current legalistic era might eliminate the need for so many judicial decisions. What I will be doing then is giving you my perception, based upon my reading, travel, and front-line experience, of what these problems are. I will be trying to provide some prescriptions to alleviate these concerns; I will use what has been said about the issues involving students in instances where these issues have found their way into the courts.

It seems to me, as I talk with students both on my own campus and on other campuses, that they exhibit a great deal of frustration. This usually emanates from a lack of knowledge or a misunderstanding of what the courts have said concerning issues involving students. We are the educators and should thus be educating our students in the legal parameters affecting their relationship with the college or university. This conference is designed not to include philosophical approaches but to discuss judicial decisions only. Therefore, I'll leave the educational aspect for another time except to say that many current crises and problems could be eliminated if we accepted the opportunity and the challenge to provide some training for our students, or at least for our student leaders, in the legal relationships which define their rights and responsibilities.

Some of the frustrations expressed by students are a result of trying to equate criminal law procedures, which they may have heard about, read about, or (heaven help us) even seen on television, to the disciplinary procedures or policies of colleges and universities. They have misunderstood the law in this regard. The courts have constantly reiterated the differences between criminal laws and procedures and those of colleges and universities. In a very articulate statement by the United States District Court for the Western District of Missouri, the attempted analogy between criminal proceedings and college discipline was exposed as unsound. That statement points out that:

> The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but rather reflects the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social

and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.

In the lessor disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus, and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.[1]

Other courts have made similar statements. The Fifth Circuit Court of Appeals, the same court which rendered the now-celebrated **Dixon** decision, just this year said that ". . . it is clear that school disciplinary regulations need not be drawn with the same precision as are criminal codes."[2] But this should not be surprising, since the court in its **Dixon** decision also drew a distinction between criminal proceedings and procedural standards required in disciplinary actions.[3] If one understands this basic difference, then less misunderstanding will result as other issues are examined.

The issues which I have found that cause the greatest misunderstanding among students are search and seizure, on-campus residency requirements, interim suspension, and those areas of Title IX which relate to students. These misunderstandings (as I have already stated) come, I think, primarily from efforts to superimpose criminal procedures on the college disciplinary process. For example, in the area of search and seizure most students are aware that the Fourth Amendment to the United States Constitution prohibits "unreasonable" searches and that warrants will be issued to conduct a search only upon a showing of "probable" cause.[4] The courts, however, have issued a series of decisions which differentiate the application of the Fourth Amendment in instances where criminal evidence is being sought for prosecution purposes from those times where college officials are attempting to maintain and enforce campus discipline. This differentiation by the courts is emphatically enunciated in **Moore** v. **Troy State,** where the United States District Court stated that "college students who reside in dormitories have a special relationship with the college involved." The court went on to say:

> The student is subject only to reasonable rules and regulations, but his rights must yield to the extent that they would not interfere with the institution's fundamental duty to operate the school as an educational institution. A reasonable right of inspection is necessary to the institution's performance of that duty, even though it may infringe on the outer bounds of a dormitory student's Fourth Amendment rights.[5]

In fact, in every instance except one (which was a lower court in New York) the courts have interpreted the Fourth Amendment to permit college administrators to search residence hall rooms if there is "reasonable cause" to believe that there is contraband in the room or that there is activity taking place which interferes with the educational mission of the institution.[6] This right to search rooms for the purpose of maintaining order and discipline, however, should be used cautiously and not interpreted to permit "fishing expeditions." Of course, what constitutes "reasonable cause" would have to be determined by the facts in each case. "Reasonable cause," however, is a lower standard than the "probable cause" required of police seeking information for civil prosecution. This distinction was spelled out in **Piazzola** v. **Watkins,** as was the fact that college administrators may not delegate their right to use the reasonable-cause standard to civil authorities.[7] Thus, if police enter a dormitory room for

purposes of obtaining evidence to be used in a criminal prosecution, they must first obtain a warrant conforming to the requirements of the Fourth Amendment.

Students also need to know that in cases of criminal prosecution, the courts have admitted evidence which was obtained by college officials and subsequently turned over to civil authorities. Evidence has been admitted which was provided to police by both public as well as private college officials.[8] In one such case at a private institution, the Supreme Court of Monroe County in New York stated, "The mere furnishing of information by police officers to a private citizen in the course of a criminal investigation, which information is later used by the private citizen to take independent action, will not require the exclusion in a subsequent criminal proceeding of evidence obtained through such independent action."[9] The court went on to say that "while it is true that a student does not lose his constitutional rights at the schoolhouse door or at entrance to the college campus, neither does he become cloaked with greater protection than any non-student who is the subject of a seizure of evidence by a private citizen."[10] An Ohio Court of Appeals has admitted evidence provided under similar circumstances except that it was seized by an official at a public institution. That court found that the college official was a **private person.** The court said the Fourth Amendment was intended as a restraint upon the activities of the sovereign authority, and that "private persons are not subject to its restrictions even though their efforts might aid in law enforcement."[11]

Finally, room searches without a warrant are also permissible in the case of an emergency, such as a bomb threat, or if obnoxious odors are present. Objects or substances prohibited by college regulations (i.e., weapons, drugs, etc.) may also be seized if they are in "plain view."[12] Both of these concepts are well-settled rules of law. Many students, however, are unaware of them and become frustrated and confused when they are applied. You can perform an educational service by letting your students know these concepts as well as the other judicial decisions we have discussed relating to search and seizure.

Often a search, either by the police or by college officials, will uncover contraband or violations of college regulations. Normally, these instances will result either in criminal prosecution downtown, if the search was made by the police, or in routine disciplinary proceedings on-campus if the search was conducted by institutional officials. However, there exists the possibility that the student could be charged both downtown and on-campus. This may raise some question in your minds concerning the concept of double jeopardy. However, without attempting to explain the legal and philosophical background of that concept, let me simply refer you to Van Alstyne's article, "The Student as University Resident," appearing in the **Special Issue of the Denver Law Journal** which Dean Yegge edited.[13] The possibility of being tried both in civil or criminal court and on-campus does exist and may be accomplished without infringing upon the student's Fifth Amendment rights.

Suppose, for example, that a student was found carrying firearms on-campus or had been charged off-campus with rape or murder. Or, more in keeping with present problems, suppose that a search conducted by you uncovered a large quantity of illegal drugs in a student's room or even that the student was charged off-campus with the sale of a large quantity of drugs. In these instances the student would probably be free on bond. These types of cases may not be common, but from personal experience I can say that they do occur. Do you permit the student to continue to attend classes and live in the residence halls until a trial can be held downtown or even on the campus? You need not wait. The courts have recognized that "when the appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on campus pending a decision following a full hearing, an interim suspension may be imposed."[14] There must be, however, either immediately or within a few days (five to fifteen days in one court's estimation),[15] notice and an opportunity for a hearing conforming to the requirements of due process at which the student could present his defense as to why the suspension should not continue or be made permanent.

A few words of caution need to be injected here. An interim suspension is a very costly sanction for a student to endure and should be used cautiously and sparingly. I have mentioned it only because there are times when it is necessary to protect the health, safety, and welfare of the college or university community; but it should not be invoked unless the element of danger is present. In addition, while institutions may pursue disciplinary action on-campus when a student has been convicted of an off-campus offense without infringing upon double jeopardy rights, I would make two recommendations: (1) that your regulations clearly enunciate this policy and your students are educated to this fact and (2) that no action be taken on an **a priori** assumption of guilt stemming from a criminal charge and that disciplinary sanctions be imposed only after conforming to the requirements of due process.

Another area where students become confused concerns on-campus residency requirements. However, the courts have also spoken out on this issue, constantly refining our understanding of the constitutional parameters embracing on-campus residency requirements. At least one court, in deciding the issue of residence (and others would probably rule similarly), made it clear that it would not abide a violation of the constitutional guarantee of equal protection. In **Mollere** v. **Southeastern College**, the court ruled unconstitutional a regulation requiring only freshmen men, but all women under twenty-one, to live on campus when the only reason for the regulation was that this particular group comprised the exact number required to fill the halls and thus retire the college's bonded indebtedness.[16] The Court provided a clue as to what would be acceptable when it stated, "For purposes of this case it might be conceded that a state university may require all or certain categories of students to live on campus in order to promote the education of those students."[17] This clue did not go unnoticed. In the now famous **Pratz** case, decided less than a year after **Mollere**, students at Louisiana Polytechnic Institute challenged that institution's policy requiring all undergraduates to live and eat on campus. The college, most likely well aware of the **Mollere** decision, supported their regulation on the basis of the educational benefit which accrues from residence hall living. The college further stated that if rental income were insufficient to retire the bonds, such obligations would be borne by all students in the form of increased tuition. In a finding favoring the college, Chief Judge Dawkins stated:

> If sound educational policies, as are shown here, dictate that the educational mission of the State is best carried out by providing for the great majority of student citizens of each State adequate housing and eating facilities at a cost which can be afforded by all students seeking entrance into a particular university, then we do not think it is our place to decree otherwise.[18]

The court also took note of the fact that it seemed natural and justifiable that the college strenuously defended the security feature of its bonds. This decision has been affirmed by the U. S. Supreme Court.

In a more recent case, **Poynter** v. **Drevdahl**, a regulation at Northern Michigan University requiring all single undergraduates under twenty-three years of age to live on campus was upheld in a summary judgment by the U. S. Court of Appeals. Without relying on **Pratz**, the court found the policy valid on the basis that the university has the customary powers of institutions of higher education and the power to construct residence halls and to obligate itself for retiring these bonds out of rental income. The court also took note of the fact that the Michigan Constitution established a policy of encouraging education and the "means" of education. The reasoning of the court was:

> Thus, the purposes enumerated above apply directly to the constitutionally encouraged "means" of education and are valid. Counsel for plaintiff, during oral argument before the Court on December 6, conceded that there may be some educational benefit from dormitory living. Need the Court therefore go further? Are plaintiffs entitled to a full trial at which they can discount and dispute the claim of educational value of parietal rules and prove that the one genuine motive for the rule is to

> pay off the debt? If the policy had no relationship whatever to the legitimate ends as stated, and if the sole purpose were to achieve a forbidden end, then further inquiry might be warranted. The Court, however, sees nothing sinister in the interest of a state-supported university in insuring its mandatory obligation to honor its bonded indebtedness. That, too, is a legitimate end. An expensive and time-consuming trial devoted to probing the collective conscious or subconscious intent of the governing board, therefore, could not affect the outcome where the purpose in so doing could be only to establish that another legitimate purpose also existed.[19]

Notice the legitimacy given by the court to retiring the bonded indebtedness which sounds so similar to the passing comment in **Pratz**. This point is refined by later court decisions which I will discuss in a moment.

Both **Pratz** and **Poynter** should be differentiated from **Mollere**. In **Mollere** only freshmen men but all women were required to live on-campus, whereas in **Pratz** and **Poynter** all undergraduates were included in the regulation. Exemptions of older students from the regulations in both **Pratz** and **Poynter** were found to be reasonable by both courts on the basis of maturity and because older students would already have gained benefits from residential living.

Implementing residence policies, however, can present a problem if the policy is enforced arbitrarily. In the **Cooper** v. **Nix** case, Judge Dawkins (the same judge who wrote the **Pratz** opinion) found that discrimination existed in the "implementation" of the "live in" regulations at Southeastern Louisiana University.[20] At S.L.U. all undergraduates were required to reside on campus, but exemptions were automatically granted to those over twenty-three years of age and members of two social fraternities.

Finally, two cases (**Prostrollo** and **Schick**) were decided this year in which the courts again found that certain classes of students could be required to live on campus without violating the equal protection clause of the Fourteenth Amendment--if one of the purposes of such a requirement was reasonably related to the educational functions of the institution. The real significance of these cases is that the District Court in **Schick** and the Eighth Circuit Court of Appeals in **Prostrollo** both found that such regulations did not violate the Constitution **even if** one of the purposes for required on-campus residency was to retire the bonded indebtedness of the buildings.[21] What differentiates these cases from **Mollere**, where financial considerations were the only purpose for the regulations, is that there were educational aims as well as financial reasons which supported the regulations in **Prostrollo** and **Schick**. The courts in the **Schick** case said, "I think in all honesty one must find, as I do find, that fiscal considerations certainly have entered into this mandatory housing policy. I do not find that the fact that they are one of the purposes of this policy when taken together with the other purposes which I clearly find are not illusionary, would cause me to find the basis for determining that there has not been a rational classification."[22] In other words, the courts will not pick and choose among legitimate aims to determine which is primary and which is subordinate. As long as there is a legitimate purpose for the regulation, its lack of primacy is not disqualifying.

Finally, the topic which I have found most confusing, not only to students but also to administrators, is Title IX of The Higher Education Amendments of 1972. As you know, the act specifically states that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.[23]

Part of the reason for the confusion in this area was recognized by Secretary Weinberger when he wrote to President Ford informing him, "With little legislative history, debate, or, I'm afraid, thought about difficult problems of application, the Congress enacted a broad prohibition against sex discrimination."[24] His statement is confirmed

by my own telephone conversation with the counsel for the Senate Committee on Education, who told me last November that he did not know enough about Title IX to speak on the subject for ten minutes, let alone the fifty minutes I had requested. In addition, there are several court decisions concerning violations of equal protection rights, including those of the United States Supreme Court, which have found discrimination not to exist in areas where H.E.W. has prohibited the very same conduct as discriminatory.[25] If that were not enough confusion, the Department of Health, Education and Welfare began enforcing their proposed rules prior to approval by the President, which is specifically prohibited under section 902 of the act.[26]

With all of these problems and confusing points--and I could cite many more--H.E.W. has promulgated final regulations, and our task now is to get on with the business of eliminating discriminatory practices in our colleges and universities. In fact, the final regulations contain a section which did not appear in the draft sent to President Ford (which you may have read in the **Chronicle of Higher Education**).[27] This change requires all recipient institutions to conduct a self-evaluation or self-study to determine where the institutions' policies and practices are in conflict with the final regulations and to take remedial action to correct any deficiencies which are uncovered as a result of this study. You must also retain a description of any modifications or actions taken to correct these discrepancies for a period of three years. The stage is set for eliminating sex discrimination; and the law, if not our consciences, requires that we get the show on the road.

Some of the areas of Title IX which concerned us a year ago have been somewhat tempered with reason and are now more palatable. This is a result, I'm sure, of the almost 10,000 public comments received by H.E.W. For instance, while housing regulations must still be consistent for men and women, albeit a court case to the contrary, the final regulations do not require that you inspect off-campus facilities but only that you take "reasonable action" to ensure that such housing is proportionate in quantity and comparable in quality.[28] You may even render assistance to persons who provide housing for members of one sex only so long as you take "reasonable action" to balance those facilities with comparable facilities for the opposite sex.[29]

The financial assistance section of the guidelines has also been tempered to permit the administration of single sex scholarships under domestic as well as foreign wills or trusts. These awards are now accomplished in a much more reasonable fashion by "pooling" student recipients without regard to sex and then making the awards.[30]

The final regulations have also dropped the requirement of an annual poll to determine student interest in types of intramural athletic competition. The department only requires that institutions take into account the interests of both sexes; and, as long as there is no discrimination, a college or university may offer whatever intramural sports it desires. Also, more reasonable regulations pertain to physical education classes and intercollegiate athletics. Physical education classes may now be grouped on an objective ability basis, and separate classes may be conducted in contact sports. Colleges and universities have three years to make this transition if they are not now in compliance.[31]

Additional clarification has been provided by H.E.W. in the area of intercollegiate athletics. For the guidance of colleges and universities, criteria have been established which the department will examine to determine if equal opportunities are available to members of both sexes. One of these criteria includes publicity, which is interesting from a First Amendment standpoint. The separate but equal doctrine has been applied to athletic competition permitting members of either sex to have their own team. If a team is not available to a previously excluded sex, then members of that sex must be permitted to try-out for the only team available unless the competition is a body contact sport. There is also a three-year transition period for compliance with this section.[32]

As you may have been able to tell from my earlier comments concerning Title IX, I have serious

reservations about many aspects of the act; however, I am an optomist and I try to find something positive in every situation. What I have been attempting here this afternoon is to make you more conscious and aware of some problems which are of concern to students. I would hope that, recognizing these problems, you will undertake to provide an educational program for your students which will inform and sensitize them to the legal relationships that govern their college experience. The self-evaluation section of Title IX provides a perfect opportunity for students, faculty, and administration to examine together their institutions, the law, and opportunities for constructive change.

FOOTNOTES

1. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education. United States District Court (W.D. Missouri), 45 F.R.D. 133.

2. **Jenkins** v. **Louisiana State Board of Education,** 506 F.2d 992 (5th Cir. 1975).

3. **Dixon** v. **Alabama State Board of Education,** 294 F. 2d 150 (5th Cir. 1961).

4. **U.S.C.A.** Const. Amend. 4.

5. **Moore** v. **Student Affairs Committee of Troy State University,** 284 F. Supp. 725 (M.D. Alabama, N.D., 1968).

6. See **Moore,** supra.; **United States** v. **Coles** 302 F. Supp. 99 (D. Maine, N.D. 1969.); **Keene** v. **Rogers,** 316 F. Supp. 217 (9th District, 1970.). The exception to the standard established in **Moore** appears in **People** v. **Cohen** 292 N.Y.S. 2d. 706 (District Court Nassau County, 1st District, 1968); however, in this case the evidence was used for prosecution purposes off-campus.

7. **Piazzola** v. **Watkins,** 442 F. 2d. 284 (5th Cir. 1971).

8. See **People** v. **Lanthier,** 97 Cal. Rpts. 297 (Supreme Court of California, 1971); **State** v. **Wingerd,** 318 N.E. 2d. 866 (Court of Appeals of Ohio, Athens County, 1974); **State** v. **Johnson** 530 P. 2d 910 (Court of Appeals of Arizona, Div. 2, 1975); **People** v. **Boettner and Gottshall,** 362 N.Y.S. 2d. 365 (Supreme Court, Monroe County, 1974.).

9. **People** v. **Boettner and Gottshall,** supra.

10. **Id.**

11. **State** v. **Wingerd,** supra.

12. See **Speake** v. **Grantham,** 317 F. Supp. 1253 (S.D. Mississippi, Hattiesburg Div., 1970); and **People** v. **Lanthier,** supra.

13. Van Alstyne, Wm. The Student as University Resident. **Denver Law Journal,** 1968, 45, 582–613.

14. **Strickland** v. **Regents of the University of Wisconsin** (W.D. Wisconsin, 1969).

15. **Gardenhire** v. **Chalmers,** 326 F. Supp. 1200 (D. Kansas, 1971).

16. **Mollere** v. **Southeastern Louisiana College,** 304 F. Supp. 826 (W.D. Arkansas, Fayetteville Div., 1969).

17. **Id.**

18. **Pratz** v. **Louisiana Polytechnic Institute,** 316 F. Supp. 872 (W.D. Louisiana, 1970) Affirmed 401 U.S. 1004.

19. **Poynter** v. **Drevdahl**, 4 College Law Bulletin 5–6, Jan.–Feb., 1972.

20. **Cooper** v. **Nix** 343 F. Supp. 1101 (W.D. Louisiana, 1972).

21. **Prostrollo** v. **University of South Dakota** 369 F. Supp. 778 (S.D. South Dakota, 1974), and **Schick** v. **Kent State University** _____ F. Supp. _____ (N.D. Ohio E.D., 1975).

22. **Schick**, supra.

23. Title IX, **Educational Amendment, of 1972**, P.L. 92–318, June 23, 1972.

24. **Chronicle of Higher Education**, 10, No. 7, April 7, 1975, p. 11.

25. For example, contrast **Robinson** v. **Eastern Kentucky University**, 475 F. 2d. 707 (6th Cir., 1973) cert. den. 416 U.S. 982, with Subpart D, Section 86.32 of the proposed rules for Title IX, **Federal Register** Part II, 40, No. 108, June 4, 1975, p. 24141. Contrast **Kaplowitz** v. **University of Chicago**, 387 F. Supp. 42 (N.D. Illinois E.D., 1974) with interpretation of Section 86.31 (b) (7) of Title IX, **Federal Register**, supra. p. 24141 given by H.E.W. officials in Atlanta briefing session on Title IX or final regulations promulgated by H.E.W. on June 3, 1975, p. 2 "Questions and Answers." Contrast **Bond** v. **Virginia Polytechnic Institute and State University**, 381 F. Supp. 1023 (W.D. Virginia, Roanoke Div., 1974) and **Geduldig** v. **Aiello**, 94 S. Ct. 2485, 1974 with Section 86.39 Title IX, **Federal Register**, supra. p. 24142.

26. See Section 902, Title IX, **Education Amendments of 1972**, supra, and see letter from Mr. William H. Thomas, Director, Office of Civil Rights (Region IV) to Mr. Dan Pummill, April 23, 1975, or correspondence from the Office of Civil Rights to Louisburg College, Louisburg, North Carolina.

27. **Federal Register**, supra. Section 86.3 (c) (i), p. 24138.

28. **Id.** Section 86.32 (c) (2), p. 24141.

29. **Id.** Section 86.32 (c) (2) (ii), p. 24141.

30. **Id.** Section 86.37 (b) (2) (i, ii, and iii) p. 24142.

31. **Id.** Section 86.34 (a), p. 24141.

32. **Id.** Section 86.41 (d), p. 24143.

THE LEGAL ASPECTS OF SELECTED CONCERNS OF STUDENTS IN HIGHER EDUCATION

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Relatively few student demonstrations are occurring today on campus as compared to the late '60s, but this does not mean that students are not concerned. They are concerned more today about finances and the quality of campus life. Indeed, they are calling for the accountability of administrators--academic responsibility, if you will, in addition to academic freedom. And, most important, they are calling for a concern for the individual.

The concerns of students and administrators should ideally be parallel. The student body today, by and large in this country, is adult (with a lowered age of majority). This and the fact that the Constitution has come to the campus should ideally support the institution--the free marketplace of ideas.

Regrettably some administrators have hidden behind a facade of alleged court cases to claim that their hands are tied, and thus they allow a few on campus to run roughshod over the rights of the majority.

Colleges and universities have an inherent authority to maintain order and freedom on campus.[1] They also have the responsibility to provide for the health, safety, and welfare of all on campus. Inevitably, the courts are called upon to determine the rights and responsibilities of both parties as they attempt to preserve that delicate balance between the rights of the individual and those of the institution and of society at large.

Just exactly what speech or what assembly is guaranteed by the Federal Constitution is debatable. There is no absolute freedom of speech, as Justice Holmes so well pointed out when he said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[2]

Also, there is no absolute freedom of assembly. Students on public campuses have the right to demonstrate as long as they do not substantially interfere with the on-going activities of the institution, nor interfere with the rights of others, nor engage in the destruction of property.[3] It must always be remembered, however, that the circumstances surrounding each case dictate the extent to which speech and assembly are protected.

Although students are free to express themselves, certain necessary ground rules have been upheld.[4] I am speaking here of rules which regulate the time and location for holding meetings on campus and requiring that reservations for the use of certain areas be made in advance. Courts have declared that such regulations are valid rules which balance the freedom of speech and assembly with the maintenance of an academic atmosphere conducive to the pursuit of the students' studies. The advance notice requirement has been defended by the courts as a reasonable method of avoiding simultaneous and competing demonstrations as well as permitting the college time to provide adequate police protection for

both the demonstrators and the college property.[5] Courts have pointed out that when non-students interfere on campus, it is the **duty** of officials to take the necessary steps to remove such interference.[6]

Another concern of students is that of student publications, and it seems that many taxpayers and alumni are always concerned about student publications. Student newspapers or other publications may not be censored. In the absence of a showing of material disruption, interference with the rights of others, or showing that the publication is obscene, censorship and control of publications by college officials is deemed an unwarranted interference with protected constitutional rights. Those publications which may seem **indecent** to many are also protected by the First Amendment. The United States Supreme Court has ruled that a state university cannot expel students for distributing "**offensive**" publications on campus. In that decision, the court declared: ". . . the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency'."[7]

It is not necessary for an institution to sponsor any student publication. With more and more students questioning mandatory activity fees used for this and other endeavors, it may be that more institutions will get out of the student newspaper business. As a result, an increasing number of institutional "house organs" would probably be initiated. This publication would be an official organ for purposes of information, announcements, policy statements, and interpretation of official policy. Student newspapers, as well as other independent or "underground papers," will continue to enjoy the constitutional protections they now enjoy. The difference, of course, is that they will have to survive in the marketplace of the financial world.

The latest case[8] concerning mandatory student fees being spent for a student newspaper occurred at the University of North Carolina, where students brought suit claiming that the collection of that portion of the mandatory student activity fee required of all students enrolled in the university which is used to subsidize the student newspaper, **The Daily Tar Heel**, constitutes a violation of their constitutional rights. They claimed that their rights were being violated since they were required to support financially a publication which supports various views, causes, and political candidates with which they disagreed. The Court ruled that a state university or college is not constitutionally prohibited from assessing mandatory student activity fees, part of which may be used to support the campus student newspaper which expresses views and promotes positions on controversial subjects, which positions and views may be in opposition to those held by some students. It is interesting to note that the Court felt ". . . constrained to observe that when one considers the magnitude of the operation of **The Daily Tar Heel** . . . there is reasonable cause for the plaintiffs to question why **The Daily Tar Heel** should be subsidized by providing it rent-free space and substantial funds." The Court went on to point out that it is obvious that the student newspaper is on a par with the other news media and that its concern goes beyond the campus. Therefore, the Court summarized the advantages of a student newspaper becoming an independent operation.

Based upon a review of court cases[9] and attorneys' general opinions,[10] it appears that administrative officials have rather wide discretion as to the use of student activity fees and, in the absence of arbitrary or capricious use of that discretion, courts will not interfere. It may be said that the governing board of an institution has final authority in authorizing student activity fees and in determining the legitimate activities which such fees support. However, administration officials may not absolve themselves of their responsibilities as to the control and supervision of the expenditure of these funds. Generally the courts have upheld the collection and expenditure of these funds at the college level so long as they are not used for purposes which are illegal, non-educational, or supportive of any religion or particular political or personal philosophy and where there is equal access to the funds. It is interesting to note, however, that the courts are not disposed toward upholding such a practice in elementary and secondary schools.

Another concern in the area of student rights which has received recent court attention is that of student organizations and their right to be officially recognized by college officials.

> A college administration may impose a requirement that a group seeking official recognition affirm **in advance** its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.[11]

It is not an absolute inherent right for a student organization to be granted official recognition. In fact, it is not necessary for an institution to officially recognize any student group. However, once a college allows student groups to organize and grants these groups official recognition, with the attendant advantages, constitutional safeguards must operate in favor of all groups that apply. This requires adequate standards for recognition and the fair application of these standards. The important point, however, is that the burden is upon the institution to justify any non-recognition--and not upon students to justify recognition of the organization.

The latest case[12] regarding student organizations occurred at the University of New Hampshire, where the Gay Students Organization (GSO), an officially recognized student organization at the university, sponsored a dance on campus. The dance was held without incident but was covered by the media and criticized by the Governor of New Hampshire. This criticism led to the University's Board of Trustees directing that the university schedule no further social functions by the GSO until the matter could be legally resolved. The GSO filed suit alleging that their First and Fourteenth Amendment freedoms were being denied. The court held that in the absence of any illegal activity or conduct which will foreseeably lead to physical disruption of university work and discipline, an officially recognized student organization may not be prohibited from holding social activities on campus similar to those engaged in by other organizations, even though those activities may offend the community's sense of propriety. It was pointed out by the court that a university may well be able to regulate overt sexual behavior, short of criminal activity, which may offend the community's sense of propriety, so long as it acts in a fair and equitable manner.

Again, as students increasingly question the collection of mandatory activity fees and the expenditure of those fees for student organizations and their activities, it may be that more institutions will simply cease to recognize officially any student organization. In this day of the tight financial squeeze in higher education, this may well be a wise political course.

I have already alluded to a lower age of majority. This development has the potential for the greatest impact upon higher education since the **Dixon**[13] case and the subsequent landslide of student rights cases. Approximately four-fifths of the states have recently lowered the age of majority. Some ramifications of this development include a lessening of remaining in loco parentis applications, residency as related to out-of-state tuition, dormitory residency requirements, student records, student financial support, and tort liability.

Probably the most significant ramification of the lowering of the age of majority is the question of "residency" of a student relative to out-of-state tuition charges. Since a lowering of the age of majority to eighteen or nineteen will classify almost all college students as adults, they may be able to obtain a legal residence in the state where they attend college and thereby avoid the higher out-of-state tuition payments.

The United States Supreme Court has held that the due process clause does not permit a state to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when

that presumption is not necessarily or universally true in fact and when the state has reasonable alternative means of making the crucial determination. The Court suggested that relevant criteria in determining in-state status could include year-round residence, voter registration, place of filing tax returns, property ownership, drivers license, car registration, marital status, vacation employment, etc. Probably one year is the maximum time a student can be kept in an out-of-state category--if the student **can show residency.** I would like to point out that residence for voting purposes should not be equated with residency for tuition purposes.

Students are also concerned with honor codes and specificity or rules, requirements, etc. Although it is impossible to cover every conceivable situation in a set of rules pertaining to students, due process requires that there should not be undue vagueness or overbreadth in the rules governing students. The degree of specificity of the rules will, of course, vary. Colleges and universities have not been required to have specific rules and regulations to the extent necessary in criminal statutes. However, "mis-conduct" as a standard for disciplinary action has been held unduly vague and overbroad.[15] In a recent case the Federal District Court in New York held[16] that the United States Military Academy Honor Code was not unconstitutionally vague. That code stated that "a cadet will not lie, cheat or steal nor tolerate those who do." The general standard in this area is that the degree of specificity required is that which allows a student to prepare an adequate defense against the charge.[17]

Students are greatly concerned today with the quality of academic life--the content of courses, the way they are graded, etc. Students are demanding academic responsibility along with academic freedom. No more are students apt to allow a professor to misuse the classroom or grade in an arbitrary manner (without clearly stated criteria).

Everyone in higher education today is concerned with affirmative action. There is certainly a need to overcome past discriminations based upon race, ethnicity, sex, or religion in regard to the admission of students and the hiring of minorities and women. The law is unsettled in this area. The **DeFunis**[18] case was appealed to the U. S. Supreme Court, which originally agreed to render a decision. However, the Court decided not to rule on the issue since Marco DeFunis was due to graduate then, and the Court thus declared the issue to be moot.[19]

The most recent reported decision on this topic, however, is a New York case.[20] In that case, minority applications for a medical school were not subjected to the admissions procedures employed with respect to others. Instead, minority applications were immediately hand screened by a member of the Admissions Committee for possible interview. Screening in their respective cases, unlike that of applicants falling within the non-minority category, encompassed academic achievement in the light of attendant educational, financial, and cultural disadvantage.

The Court declared that admission based upon race alone would constitute a violation of equal protection rights, but the policy was ruled to be constitutional. In upholding the admissions policy the Court expressed the opinion that:

> . . . there is no bar to considering an individual's prior achievements in the light of his disadvantages, culturally, economically and educationally, as a factor in attempting to assess his true potential in a successful career. The court is of the further opinion, as expressed oft times by others, that standards of admission need not be based upon predetermined robot-like mathematical formulae. On the contrary, educators should be free to assess the credentials and the persons presenting them upon entrance outside of test scores and formula ratings.[21]

To my knowledge, there has been no reported court case dealing with test scores being used as the sole or a major criterion for admission. There are a number of decisions in the area of employment in which the use of test scores as either the sole or a major criterion for employment, promotion, merit pay, or other advancement has been struck down as an invalid

criterion on the grounds that such instruments have a discriminatory affect on certain groups and fail to show any relation to job performance.

In the absence of clear and convincing evidence that test scores do predict success, and following the logic of those decisions in the area of employment, it may well be that in the area of admissions courts will look askance at test scores. However, it may well be that courts would indeed look with favor upon some criteria which measure the achievements of an individual in the light of his past disadvantages--cultural, economical, or educational--as one factor to be considered in determining future success of that individual. In short, if an applicant has pulled himself up by his own bootstraps then this could be a positive consideration in making the admission decision.

Most of the issues Dean Gehring and I have discussed are those concerning basic constitutional freedoms. The United States Supreme Court looks upon these basic rights as "preferred freedoms." And if any society is to be truly free then its sacred cornerstone must indeed be maximum individual freedom. Since your work is intimately intertwined with basic individual rights, the responsibilities you bear are awesome; but there can be no greater service rendered than that of accepting that responsibility and providing the needed leadership in this noble educational enterprise in order that the individual and the institution may work together for a better tomorrow.

FOOTNOTES

1. **Esteban** v. **Central Missouri State College,** 415 F. 2d 1077 (1969).

2. **Schenck** v. **United States,** 294 U.S. 47 (1919).

3. **Tinker** v. **Des Moines Independent Community School District,** 393 U.S. 503 (1969).

4. **Bayless** v. **Martine,** 430 F. 2d 873 (1970); and **Sword** v. **Fox,** 446 F. 2d 1091 (1971).

5. **Ibid.**

6. **Smith** v. **Ellington,** 334 F. Supp. 90 (1971).

7. **Papish** v. **Board of Curators of University of Missouri,** 93 S. Ct. 1197 (1973).

8. **Arrington** v. **Taylor,** 380 F. Supp. 1348 (1974).

9. **Veed** v. **Schwartzkopf,** 353 F. Supp. 149 (1973); **Lace** v. **University of Vermont,** 303 A. 2d 475 (1973); **Rainey** v. **Malone,** 141 S.W. 2d 715 (1940); **Randall** v. **Colorado State Board of Agriculture,** Dist. Ct., Court of Larimer, Civ. Action No. 19032 (1969); **Stringer** v. **Gould,** 314 N.Y.S. (2d) 309 (1970); **Fellner** v. **McMurray,** 323 N.Y.S. (2d) 337 (1971); **Conn** v. **Regents of the University of California,** No. 375307 Sup. Ct., Alameda County (1968); **Huddleston** v. **Ketter,** Sup. Ct., Erie Court, N. Y. (1971); **Moye** v. **Board of Trustees of University of South Carolina,** 177 S.E. (2d) 137 (1970); **Farrell** v. **State Board of Regents,** 179 N.W. (2d) 533 (1970); **Iowa Hotel Association** v. **State Board of Regents,** 114 N.W. 2d 539 (1962); **Grier** v. **Bowken,** 327 F. Supp. 892 (1971).

10. Attorney General Opinion, Oregon, 1969; Attorney General Opinion, Wisconsin, 1949; Attorney General Opinion, Ohio, 1971.

11. **Healy** v. **James,** 92 S. Ct. 2338 (1972).

12. **Gay Students Organization of the University of New Hampshire** v. **Bonner,** 509 F. 2d 652 (1974).

13. **Dixon** v. **Alabama State Board of Education,** 294 F. 2d 150 (1961).

14. **Vlandis** v. **Kline,** 93 S. Ct. 2230 (1973).

15. **Soglin** v. **Kauffman,** 295 F. Supp. 978 (1968).

16. **White** v. **Knowlton,** 361 F. Supp. 445 (1973).

17 **Scott** v. **Alabama State Board of Education,** 300 F. Supp. 163 (1969).

18. **DeFunis** v. **Odegaard,** 507 P. 2d 1169 (1973).

19. **DeFunis** v. **Odegaard,** 94 S. Ct. 1704 (1974).

20. Alevy v. Downstate Medical Center of the State of New York, 359 N.Y.S. 2d 426 (1974).

21. Ibid.

THE BUCKLEY AMENDMENT

Barry George*

I. Debate

> Mr. President, it is time for the U. S. Senate to take a stand, and to act to protect, the rights and privacy of parents and students where the Federal Government and Federal funds are involved.[1]

Senator James L. Buckley had concluded the floor presentation of his amendment to the General Education Provisions Act of 1974. Citing several of the "many absurd and sometimes tragic examples"[2] of abuses, Buckley had proposed that the Congress exercise its control over federal education funds to assure the confidentiality of student records. The proposed amendment provided for access to student records by students and their parents. It required parental consent for student participation in medical, psychological, or psychiatric testing or treatment. Finally, it prohibited the release of student records without parental or student consent to persons other than school officials.

The Buckley Amendment was debated in the Senate on the afternoon of May 14, 1974. The senators rejected an amendment offered by Senator Stevens to delete the section dealing with the release of records to outside parties. The section dealing with medical and psychological testing was considered separately and defeated in a close roll call vote. An amendment to protect schools which refuse to administer such tests was offered and accepted instead. The balance of the Buckley Amendment passed the Senate by voice vote.

The enactment of the law represents a highly unusual instance where an issue gained immediate visibility and was accorded expeditious legislative action. The Buckley student records legislation was conceived as a result of a timely **Parade Magazine** article,[3] which was part of a lobbying effort conducted by a Maryland-based group called the National Council of Citizens in Education. An aide to Senator Buckley followed up an initial exposure to the problem with additional research and succeeded in interesting the senator in introducing remedial legislation.

Even as the Buckley Amendment facilitated prompt legislative action on a matter of public concern, Senator Buckley's floor maneuver drew criticism from colleagues who disagreed with his approach to the problems. Many senators were unaware that an educational privacy amendment had been scheduled for consideration; many were unprepared to take a position on the issue. Several of the floor remarks reflected ambivalence or uncertainty, the most striking example of which was Senator Hart's admission, "I guess my honest answer is that I do not know which side I am on."[4]

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* Mr. George submitted this paper as a Washington Semester Thesis at American University, Washington, D.C. It was subsequently edited by Sheldon Elliot Steinbach, Staff Counsel, American Council on Education, who presented it to this conference.

Moreover, it is apparent that the voting on the Buckley Amendment took place in an atmosphere of general confusion. Parliamentary inquiries were repeated throughout the voting on the various sections of the amendment. When it was all over, some senators were not aware that the greater portion of the Buckley Amendment had been passed on a voice vote.

Throughout the floor debate on the Buckley Amendment, senators alluded to the lack of committee review of the proposed legislation. The most persistent of Buckley's critics was Senator Claiborne Pell, chairman of the Senate education subcommittee. Pell stated:

> As much as I would like to see the Senator succeed in his proposal as he explains it, we are concerned not with what the Senator intends the language he proposes to accomplish. It is what the language would do. This is what bureaucrats in future years will rely on, what the language in the bill is.[5]

As the events and comments recorded on the day of its introduction suggest, the Buckley Amendment is a law which has two very special characteristics. It is, first of all, a law which was accorded brief and superficial treatment in Congress, as an amendment which was not submitted for specific consideration in one house and as a proposal which was not subjected to committee hearings in either house. Secondly, it is a law which assigns to an executive agency the discretion to enforce a new category of federally-mandated individual rights. The combined effect of the two features is to confer an unusual amount of importance on political actors and processes outside the traditional legislative and judicial channels for making the law and passing judgment on compliance.

II. Perspective

A Washington, D. C., mother is denied access to the psychological tests which indicate to school officials that her child should repeat kindergarten. A new teacher receives this summary of a student's previous classroom performance: "A real sickie--absent, truant, stubborn, and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was a huge accomplishment to get this far). Have fun." A New York landlord gains access to his youthful tenant's college financial records. The secretary of a private tutoring agency calls a public junior high school to inquire about a child's reading level and is in turn also briefed about the child's bedwetting history and her mother's alcoholism.[6]

The abuses cited by advocates of the Buckley Amendment represent highly visible instances of the privacy violation associated with student records. Individuals are denied the right to see records that significantly affect their own lives or the lives of their children. Unverified and biased assessments of individuals are passed along to influence the predisposition of others. Information of an intimate or personal nature is gratuitously offered to parties having no legitimate interest in the personal life of an individual.

The right to privacy is an elusive concept. It is perhaps best defined as the right of an individual to keep to himself those aspects of his personal life in which society has no compelling interest: the right of "inviolate personality."[7] It involves as well the individual's right to control the communication of information about himself to others.

Inasmuch as the educational process occurs during an individual's formative period, the role of the family is crucial in assuring the student's right of privacy. Implicit in the belief that parents should exercise discretion concerning access to student records is the assumption that parents should have pre-eminent authority in the upbringing of their children.

The record-keeping process in schools has mushroomed in recent years as various new categories have been included in student files. The enrollment and attendance registers which New England schoolmasters began keeping in the 1820's have become, in some instances, "grab bag[s] filled with test scores, medical and psychological reports, comments on behavior . . . information, such as parent's

private lives or political activities, which is quite irrelevant to the purpose of education."[8] Diane Divoky has pointed to the growth of an elaborate cumulative records system: the increasing bureaucratization and centralization of schools; the acceptance of the "whole child" concept, which was reflected in the 1925 National Education Association recommendation that health, guidance, and psychological records be kept for each pupil; and Office of Education directives which, by 1964, provided for eight major classes of information to be collected and placed in student records.[9]

Serious efforts to come to terms with the school records problem did not begin until very recently. Concern for student records policy was a peripheral aspect of the efforts by conservatives in the early 1960s to curb psychological and behavioral testing in schools.[10] Student rights advocates became interested in access to school records later in the decade. In 1969, a working group of prominent educators, lawyers, and social scientists sponsored by the Russell Sage Foundation drew up a comprehensive set of record-keeping guidelines, which were published and distributed throughout the country. Two years later, the National Education Association joined the forces calling for record-keeping reform by approving a "Code of Student Rights and Responsibilities" which included progressive student records guidelines.[11]

In the years immediately prior to the enactment of the Buckley Amendment, the courts began to address problems associated with family and student privacy. Although the Supreme Court did not deal explicitly with the question of parental and student access to records nor the question of protection against the release of records to outside parties, it did render decisions that a set of fundamental parental rights are implied in the concept of "liberty" embodied in the due process clause of the Fourteenth Amendment, in the Ninth Amendment's reservation to the people of "basic, not nonenumerated rights," and in common law principles defining the nature of parents' responsibility toward their children.[12]

The proximate social influence for legislation against the abuse of student records was the crystallization of a growing concern for individual privacy in the face of the revelations of intrusive activities on the part of government agencies and private organizations. Senator Buckley related the growth in influence of institutions to "the sense of a loss of control over one's own life and destiny," and placed the issue in the most contemporary perspective: "The revelations coming out of the Watergate investigations have underscored the dangers of Government data files, and have generated increased public demand for the control and elimination of such activities and abuses."[13]

III. Conference

The Buckley Amendment was considered in conference as one section of the comprehensive General Education Provisions bill. Not all of the conferees were interested in the Amendment; fewer still were enthusiastic about it. Several conferees, Representatives Chisolm, Steiger, and Ashbrook, took a special interest in the Buckley Amendment, and were influential in ensuring its inclusion in the conference report. Chisolm was preoccupied with a concern over privacy abuses involving minority students; Ashbrook felt the measure would help prevent unwarranted encroachments by institutions and agencies on the privacy of families and individuals.[14]

The effort on behalf of the Buckley Amendment was aided by the most controversial issue associated with the 1974 General Education bill, bussing to achieve racial integration. The fates of the two measures were nevertheless linked at the conference stage. Inclusion of the Buckley Amendment was, to a certain extent, a palliative offered in order to secure Ashbrook's acceptance of the conference bussing plank. The trade-off was framed in the following terms: the addition of an educational privacy amendment would make the probussing provision more palatable for congressional conservatives.

Input from groups outside the legislative branch did not become important until the conference stage. Higher educational interest groups entered the controversy at the conference stage. The American Council on Education (ACE), an organization representing American colleges and universities, sought to have the Buckley provisions deleted from the General Education Act. A letter from the Council's Government Relations director, John F. Morse, to Senator Pell set forth the organization's position. Emphasizing that, "In principle, we have no quarrel with the concept of parental access," Morse continued:

> Nevertheless, we fear there may be booby traps in this legislation that have not been considered or even identified. As far as we know, the proposal has not been the subject of hearings in either the House or the Senate. We do not believe that legislation on any issue as potentially important as this one--one that pits right-to-know against right-to-privacy and confidentiality--should be enacted without sober consideration by the appropriate committees in the Congress.[15]

The Office of Education (OE) and the National Education Association (NEA) jointly submitted to the conference committee alternative language for the Buckley Amendment. Their proposal provided for access to personally identifiable information by OE and state education authorities for the purpose of audit evaluation. In addition, it included a provision which stipulated, "Nothing in this Act shall be construed to inhibit research as appropriate for needed data-gathering activities, provided the student's and family's rights of privacy are respected and protected."[16]

The conferees accepted the suggested language regarding access by administrative authorities and made additional minor changes in the privacy amendment passed by the Senate. They rejected the general qualification suggested by OE and NEA. The Buckley Amendment thus passed the conference stage through the efforts of several interested congressmen, on the good graces of auspicious circumstances, and in spite of opposition from higher education.

IV. Controversy

Following approval of the conference report in both houses, President Ford signed the General Education Provisions Act into law on August 21, 1974. Although it is clear that organized education was not unaware of the Buckley Amendment before it became law, it is also apparent that the vast segments of the education community did not begin to grasp the entire dimension of the act's implications until they were confronted with the fait accompli.

The weeks following the signing of the Buckley Amendment found the nation's colleges and universities in a state of "confusion in the face of ambiguity," in the phrase of a Yale administrator. John Morse of ACE characterized the dilemma in an interview with the **Washington Star News**: "Institutions just don't know what the deuce to do. Should they destroy records they don't want disclosed, turn over the raw files to students, or simply refuse to comply with the law?" At Harvard University, officials removed letters of recommendation from the student files, securing them elsewhere as they proceeded to ask writers if they would agree to submit their letters for student inspection. Meanwhile, several students considered the option of pressing legal charges.[17]

The tone of the official responses of higher education organizations and institutions became apparent in early October. Richard Lyman, president of Stanford University and chairman of the Association of American Universities' Council on Federal Relations, drew the attention of the media when he asked for a meeting with Senator Buckley to resolve questions causing "considerable anxiety among the Association membership."[18] Officials at all of the Ivy League colleges, led by Harvard's general counsel, Daniel Steiner, criticized the privacy act and endorsed a lobbying effort to postpone implementation of the new provisions. The American Council on Education once again took a lead role. Eight other higher education associations joined ACE in an October 8 letter to the relevant House and Senate subcommittees. The letter called on Congress to postpone the effective date

(November 19, 1974) until July 1, 1975, in order to allow time for public debate and Congressional hearings.[19]

The higher education organizations focused their criticism on several issues which they suggested were unintended consequences of the Buckley legislation. The foremost of those concerns was with letters of recommendation written by professors prior to the enactment of the law. The Buckley Amendment granted students the right to inspect all records contained in their files, including letters of recommendation for admissions or employment purposes. The education organizations contended that the exercise of the student right to see existing records would serve to violate the rights of professors who had written letters of recommendation "with an explicit commitment that they would be confidential."[20]

The critics addressed other areas where they perceived a new student right of access. They feared that the new law would permit a student to inspect the confidential financial statement submitted by his parents in support of an application for financial aid. They feared as well that students would be granted access to psychological records maintained in the files.

The October letter closed with an appeal for congressional hearings on the amendment: "Hearings would provide a systematic opportunity for affected parties such as faculty, students, and parents, to express their views on the issues listed above or other important issues the Act deals with. (The Act affects in a fundamental way the rights and obligations of a number of people and institutions, and it would be appropriate to have hearings to discuss these rights and obligations)."[21]

The areas of contention in the early October communication did not comprise the entire body of problems or controversial issues. A subsequent ACE memorandum summarizes most of the additional concerns. The memorandum lists the following as practices "Congress probably did not intend to affect":

- The exercise of a student waiver regarding the right to inspect letters of recommendation.
- The furnishing of student academic records to the parents of dependent students.
- The transfer of records to state and local authorities as required by state law.
- The transfer without parental/student consent of health data in the case of medical emergencies.[22]

The memorandum also suggested the need for clarification in order that students would not presume to challenge their grades, and in order that accrediting agencies could be considered to have the requisite "legitimate interest" in order to gain access to personally identifiable student records. The ACE memorandum maintains that some of the items "probably require statuatory amendment," while others "seemingly require only legislative history as a basis for drafting regulations to clarify them."

In the face of the growing opposition, Senator Buckley sought to defend the legislation he had proposed against the possibilities of revision and delay. In mid-October he stated his intent to sponsor changes in the law which would protect the confidentiality of letters of recommendation written before September 20, 1974, and provide for the practice of a student waiver respecting the confidentiality of letters of recommendation to be written in the future. Buckley, however, remained adamant in his insistence that the effective date not be postponed.

Buckley aide John Kwapisz addressed the specific areas of controversy in a position paper entitled "Questions About and Objections to the Buckley Amendment--And Responses." Kwapisz pooh-poohed the general criticism. "It is natural that educational institutions should complain, they are being required to change long established practices and (bad) habits, and change is often painful or, at least, uncomfortable." Allowing that

there was indeed "one largely legitimate objection," he maintained that most of the objections were either "not substantive" or else issues capable of being "resolved by reasonable regulations."[23]

The "legitimate objection" to which Kwapisz alluded pertained to the confidentiality of letters of recommendation. Kwapisz placed the remainder of the controversial issues in the category of "red herrings" and "extreme and unwarranted readings of the law," or in the class of problems capable of being remedied through "reasonable interpretation."

The memorandum set forth the case against the need for Congressional hearings on the Buckley Amendment. Kwapisz pointed out that the proposal had been circulated to the senators and to "several organizations" more than two weeks prior to its introduction, and he also maintained that there had been ample opportunity for interested parties to suggest changes during the conference. He implied that the legislation had been shaped by experience comparable to congressional hearings: the record of the more than twenty states which had enacted similar legislation, and the recommendations of education, administration, and counseling professionals as embodied in, for example, the guidelines published by the Russell Sage Foundation.

With the higher education community clamoring for amendment and delay, and Senator Buckley proposing to sponsor limited alterations, the role of the Senate education subcommittee chairman became crucial. Senator Pell had been hostile to the idea of the Buckley educational privacy legislation from the time of its inception. He had first expressed opposition upon being informed of the proposed amendment several weeks before its introduction.[24]

As the new school term got under way in September and October, Senator Pell, and the staff and other members of the education subcommittee, came under increasing pressure from the higher education organizations. The groups urged Pell to introduce legislation to postpone the effective date of the Buckley Amendment, or to sponsor an amendment to exempt higher education institutions from the provisions of the act.

On November 14, the office of the chairman of the education subcommittee issued a statement. Senator Pell was "attempting to work out some agreement on the Buckley Amendment with Senator Buckley." If no agreement could be reached, the statement continued, Pell would "in all probability sponsor an amendment to delay the effective date of the Buckley Amendment."[25]

Consultations between the Buckley office and the staff of the education subcommittee were held during the last two weeks of November. On December 3, the two Senators issued a joint statement. Agreeing "that certain phrases and sections adopted on the floor did raise certain questions and were subject to various interpretations," Buckley and Pell announced their intention to "seek legislation to remedy certain ambiguities in the Family Educational Rights and Privacy Act." The joint release stated that the proposed amendment would be attached "to an appropriate legislative vehicle."[26]

V. Compromise

The revisions in the Family Educational Rights and Privacy Act of 1974 were worked out at two crucial stages—in the interoffice bargaining between Buckley and Pell and in the conference committee consideration of Buckley-Pell.

The revised amendment represented a compromise between the two sponsors. Buckley had preempted a motion to postpone the effect of the privacy amendment and to have it submitted for possible further alteration in committee. Pell had exacted a far more extensive set of changes than Buckley would have preferred to have made.

The higher education groups exerted a great deal of pressure on Pell for extensive amendment of the Privacy Act. It is significant that, despite Buckley's opposition on several points, the resultant Buckley-Pell Amendment was acknowledged by

the higher education community as a measure which "addresse[d] virtually all of the concerns registered by colleges and universities."[27]

Several of the Buckley-Pell revisions can be regarded as concessions on Buckley's part. Buckley found objectionable the amendment permitting organizations like the Educational Testing Service (ETS) and the College Entrance Examination Board (CEEB) access to student records for test development and validation purposes. In the words of Buckley aide John Kwapisz, "That was not exactly our doing."[28] Neither did Buckley favor the definition of the term "students" so as to prevent individuals from challenging the records of schools to which they have sought admission. Another provision which was not consistent with Buckley's initial intent is the one which obviates the practice whereby the instances of inspection of student files by most school officials are recorded and maintained with the file.[29]

The conference committee made two major changes in the langauge of the Buckley-Pell Amendment. The conferees modified a proposal which would have created the potential for a significant increase in the number of outside parties privileged to obtain information from student files. A provision to permit access to "state and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to state law"[30] was changed to permit such access only in the case of state law adopted prior to the effective date of the act (November 19, 1974). A second conference modification sought to assure student choice regarding a waiver of access to letters of recommendation. The conferees included in the waiver provision the stipulation that waivers may not be required as a condition for admission to institutions or for receipt of financial aid or other services and benefits.

VI. Amendment

On December 13, 1974, Senators Buckley and Pell jointly offered a series of amendments to the Family Educational Rights and Privacy Act of 1974. The amendments were attached to Senate Joint Resolution 40, an act to establish a national conference on libraries in 1976. The conference committee reported the final version of the amendments on December 17. Both Houses of Congress accepted the conference report.

The law as revised provides for the practice of a student waiver with respect to letters of recommendation for three classes of procedures: admission to educational institutions, application for employment, and receipt of awards or honorary recognition. The amendment makes explicit that "such recommendations are to be used only for the purpose for which they were specifically intended," and states clearly, "Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits."[31]

The law as revised includes separate sections to define the terms "educational agency or institution," "student," and "records." The definitions serve, in part, to clear up the misunderstandings caused by the vague language of the original amendment. The definition of "educational agency or institution" as "any public or private agency or institution which is the recipient of funds under any applicable programs" serves to make the act's applicability uniform for all the subsections. The term "applicable" makes clear that the references to federal programs pertain only to those administered by the Office of Education, not to the other education-related programs administered under the auspices of divisions within HEW. The revised amendment defines "student" in such a way as to make uniform the applicability of the provisions to former students, thus remedying a pre-existing inconsistency. Finally, the definition of "records" clarifies the scope of the law by excepting two relatively noncontroversial classes of information: "Directory information," which may include name, address, telephone number, date and place of birth, major fields of study, athletic activities, degrees and awards, and the most recent educational institution attended; and records of administrators and teachers "which are in the sole possession of the maker thereof."

Significantly, the term "student" is defined in such a manner as to prevent an individual who has been denied acceptance at an institution from challenging the records in the possession of that institution. In addition, the definition of "record" exempts from the right of "access" the records maintained by an institution's law enforcement unit which are "maintained solely for law enforcement purpose" and medical or psychological records on a student eighteen years or older. (The student may enlist a professional of his choice to review such records.)

The Buckley-Pell Amendment considerably expanded the conditions under which outside access is permitted without parental or student consent. Provisions extending that right to parents of a dependent student as defined by the Internal Revenue Code and to "appropriate persons" in the case of health emergencies address essentially noncontroversial subjects; several other "access" provisions are concerned with important points of contention.

The original Buckley Amendment granted access without consent to administrators and teachers having a "legitimate interest" in student records. However, it was not explicit on the question of the individuals responsible for making determinations of "legitimate interest." Buckley-Pell assigns that responsibility to the educational institution.

The new law excepts from the general "access" restrictions state and local officials to whom state law in effect on November 19, 1974, specifically required information to be reported. This exception was added in recognition of various state laws which provide for the reporting of communicable diseases and certain kinds of injuries but is relevant in other situations as well.

Buckley-Pell extends the right of access to two additional groups. Accrediting organizations are permitted access in order to carry out accrediting functions. Organizations like the Educational Testing Service and the College Entrance Examination Board are granted access to records in connection with "developing, validating, or administering" predictive tests, provided their studies are conducted in such a manner as to safeguard personally identifiable data from others and provided the data are destroyed when they are no longer useful.

VII. Executive

The Buckley Amendment required the Department of Health, Education, and Welfare to take all appropriate enforcement actions and to establish an office to "investigate, review, and adjudicate violations" of the act.[32]

Implementation of the Buckley Amendment, Section 93–380 of the General Education Provisions Act of 1974, was the responsibility of HEW's Office of Education. In the months following the enactment of the original student records law, OE proved reluctant to undertake definitive action to administer the provisions of the act. The Office of Education did not write to recipients of federal education funds to inform them of their obligations under the Act until November 19, 1974, the effective date of the law. Neither did OE meet the act's October 21 deadline for the submission of a timetable for promulgation of regulations concerning the enforcement provisions of the act.[33]

Senior OE officials were stating openly that they did not intend to produce regulations to implement the Buckley Amendment. In an address before the College Entrance Examination Board on October 29, H. Reed Saunders announced that, with the exception of the section concerning HEW data gathering activities, OE had no intention of writing regulations for the act, and that, for the time being, complaints would be handled on a "case-by-case" basis. He attempted to justify OE's inaction with the assertion, "It wasn't ours—we didn't ask for it."[34]

In a November 18 press release, Weinberger promised that regulations would be completed before the year's end for the substantive sections of the law, as well as for the section requiring guidelines to protect the privacy rights of parents and students in connection with department-assisted activities. In addition, Weinberger announced the establishment of a

temporary office to answer inquiries and complaints concerning the act. Weinberger had appointed Thomas S. McFee, Deputy Assistant Secretary in HEW's Office of Management Planning and Technology, to head the office.

According to McFee, the delay in the secretary's directive did not represent an informed policy to countenance OE's procrastination; rather, it was the result of "bureaucratic complications." The realization that the Buckley regulations were not forthcoming from OE had come too late to permit action well in advance of the act's effective date.[35] In his press release, Secretary Weinberger stressed the President's "endorsement of this approach to ensure the rights of individual students and parents," maintaining that this was consistent with "the continuing efforts of the Domestic Council Committee on the Right of Privacy on which [the President] serves."[36]

In the wake of the Weinberger initiative, the administrative effort on behalf of the Buckley Amendment swung into action. Responsibility for the act rested in a division that was not otherwise involved with education institutions and education programs. It rested in the hands of individuals who had interests and expertise in the privacy field or, at least, an interest in acquiring such expertise. Consequently, two sets of regulations (one set for the Buckley Amendment, one for Buckley-Pell) were prepared before the President signed the revised law on New Year's Eve, and complaints and inquiries began to receive prompt attention.

VIII. Regulations

The proposed HEW regulations for the amended Family Educational Rights and Privacy Act were printed in the Federal Register on January 6, 1975. Under the Administrative Procedures Act, the guidelines could not become finalized regulations until after a sixty-day period to allow for "comment" from interested persons. (At the present time, officials in the McFee office are reviewing the "comment" and preparing to publish final regulations.)

The comment period assumed a special significance in the case of the Buckley Amendment. The comments numbered 312, including communications from school districts, colleges and universities, education organizations, research foundations, student organizations, civil liberties groups, corporations, and private citizens. The quality of the comments received ranged from simple, and often irrelevant, private opinion letters to sophisticated legal analyses and elaborate position papers.

The comments received on the Buckley Amendment can be classified in two broad categories. Most of the comments offer suggestions for more precise definitions or more specific guidelines regarding procedures established under the act. A second category deals with approaches to the problem of enforcement of the provisions.

Comments on the proposed regulations for "access" procedures focus on the administrative rule that requires institutions to provide copies of educational records to parents and students, a procedure not specified in the act. An explanation which accompanies the proposed rule asserts that "a right to obtain copies is an essential part of a right to access."[37] The comments in favor of a right to receive copies have suggested additional language to assure that copies will be provided promptly and at a low cost to the individual making the request.

Several of the comments suggest that the regulations concerning the "hearing" procedures are inadequate. For example, NCCE asserts that "the present challenge and hearing procedures could lead to possible marathons of endurance."[38]

Several of the comments offer suggestions involving the information obtained and retained by third parties. Some argue the need for tighter procedural controls for third parties and urge that the regulations ensure that outside groups cannot transfer information from student files without parental or student consent. The National Education Association suggests that institutions be prohibited from destroying records once those records have been released to third parties.

The issue of student "waiver" remains controversial in the regulation and comment stages. The ACLU asserts that "the conference

mandate [that a waiver may not be required for admission] is easily frustrated," and suggests strong language to guard against that possibility.[39] The National Student Association urges that the regulations "elaborate that any subtle coercion" would be considered "effectively preventing" students from exercising their right of access as provided under the act. The NSA suggests that the regulations stipulate that a "strongly worded suggestion" [to waive access] on an application "would be construed as an action which would effectively prevent the exercise of that right."[40] In addition, it should be noted that under the act the provision that waivers may not be required by institutions refers directly to the section dealing with letters of recommendation for **admissions** only. An important determination to be made in drafting the final regulations is whether the provision can be made applicable under the "effectively prevents" clause to the section concerning application for employment and receipt of honorary recognition.[41]

An extremely significant enforcement issue is the question of whether or not a right of private action was created by the act. Such a right was intended in the original Buckley Amendment by virtue of a reference to another section of the General Provisions Act; however, the reference was inadvertantly deleted in conference.[42]

The question of the right of private action is subject to at least two legal interpretations. On the one hand, compliance with the Buckley privacy rights can be regarded as strictly a funding condition in a contract between the educational institution and the Office of Education. Under this interpretation, the individual parent or student is considered a third party beneficiary who, depending on the interpretation of the circumstances, may or may not be privileged to initiate legal action to enforce the contract. Alternately, the privacy rights can be considered as an essential part of the general policy of an institution, hence an element in a contract between the individual parent or student and the institution. Under this interpretation, the parent or student may initiate court action if the institution breaches that contract. There remains, however, a question as to whether jurisdiction belongs to state or federal courts. Accordingly, the legal aspects of the private action issue are uncertain at the present time. HEW officials are proceeding on the assumption that an administrative agency does not have the authority to confer jurisdiction on the courts.[43]

The enforcement issues raised in the various comments indicate that the determinations made in the drafting of final regulations will have a considerable influence on the practical effect of the law. In particular, the adoption of the "strategic approach" suggested by the administrative conference could serve to enchance HEW's capacity for enforcing the provisions of the act.

IX. Conclusions

The history of the Buckley Amendment highlights some important characteristics of the political process which shaped it. The existing Family Educational Rights and Privacy law is the result of a unique process of informal and institutional interaction, a process in which interest was articulated after the original enactment. The unique record of the act places in a fresh perspective the roles played by legislators, interest groups, and administrators in policy making.

With a minimum of consultation with or assistance from his colleagues, Senator Buckley was able to seize the initiative by offering legislation related to a general subject in contemporary vogue. The importance of the House-Senate conferees is also made clear. A strong student records provision would not have survived either conference had it not been for individual conferees who took a special interest and utilized their political resources. The legislative story of the amendment points as well to the influence of staff personnel in Congress. The Buckley Amendment is perhaps more appropriately termed the Kwapisz Amendment, inasmuch as it was aide John Kwapisz who conceived (and drafted) the legislation, supervised the public relations effort, and conducted the essential business with the concerned legislators (and staff), administrators, and interest group representatives. Similarly, the

individual staff persons on the House and Senate education subcommittes were influential in shaping the act--the majority staff on the Senate side in limiting the scope of the original provisions, the House staff in ensuring the inclusion of palpable student records provisions in both of the conferences.

In the case of the Buckley Amendment, the political process was clearly responsive to the concerns of interest groups. The higher education organizations were instrumental not only because they possessed the essential expertise (i.e., they understood record keeping practices) but also because the cooperation of their clientele was necessary for the effective implementation of the law. Neither electoral nor financial leverage were relevant considerations. Significantly, the National Education Association viewed the controversy at a distance. However, personal influence and informal ties were important; college officials took advantage of alumni relationships, shared experiences, and promoted cooperation among lobbyists, legislators, and administrators. The participation of education interest groups in the Buckley Amendment policy making thus involved the application of appeals to reason and geniality directed at selected Congressmen and administrators.

The Buckley Amendment affair indicates that the higher education organizations are well organized, sophisticated, and influential. Nevertheless, it is difficult to draw conclusions concerning the precise degree of that influence. The question of influence is obfuscated by the serious nature of the practical problems associated with the original law. On the one hand, one might concede a decisive victory to organized higher education and, for instance, cite an assertion made by the College Entrance Examination Board's Larry Gladieux: "The new language addresses virtually all of the concerns registered by colleges and universities."[44] On the other hand, Senator Buckley made an important observation when he noted that "the resistance has been specific."[45] The critics did not attack the spirit of the law; rather, they concentrated their efforts on specific practical problems. Efforts to postpone the legislation or except higher education failed. The higher education groups were successful in bringing about changes affecting a significant number of provisions; but, for the most part, the changes were contained within bounds not inconsistent with the intent of the original Buckley Amendment.

Policy makers were responsive to the interests and opinions of student and civil liberties interest groups as well. Although they lacked the resources and, in some cases, the political sophistication of the education organizations, the National Committee for Citizens in Education, the National Student Association, the American Civil Liberties Union, and the Children's Defense Fund were able to impress upon decision makers their compelling points of view. The NSA has been credited by some observers with the responsibility for the inclusion of the provision intended to ensure that "waiver" is not made a mandatory practice.[46]

The performance of the HEW bureaucracy proved conscientious when the administrative criterion was changed from policy field to expertise. The handling of inquiries and complaints, the reviewing of "comments," and the drafting of regulations have been careful and diligent operations under the auspices of a division which is not otherwise involved with the administration of education programs and which prides itself in the possession of expertise on the general subject of privacy. In addition, the aspiring officials who, in recent months, have handled Buckley-related problems exclusively have acquired, in effect, a personal interest in the effective administration of the act.

The political history of the Buckley Amendment thus illustrates the importance of various institutional relationships and processes. At the same time, it is essential that an understanding of the roles played by the various concerned political actors be tempered with an appreciation of the practical problems at issue. Although organizational and personal interests were influential in determining the actions and positions of those concerned, the process of revision occurred in the general context of an attempt to reconcile an idealized concept with the practical realities.

If reconciliation of the ideal with the real is considered to be the standard for judging the process which shaped the Buckley Amendment, then that process must surely be deemed a good one. The principles Buckley sought to realize have been established as public policy; most practical problems have been remedied. The Buckley Amendment is considered a reasonable law by almost all concerned parties. A matter of general concern has received expression in federal statute. The system has been "responsive."

The most significant aspect of the Buckley experience, however, is the fact that the law was shaped by a total process which minimized the factor of accountability. The nature of the family and student privacy policy was not generally determined by elected officials or according to highly visible processes. Instead, the greatest discretion was conferred upon nonelected and obscure policy makers, the greatest significance accorded to processes outside the orthodox law-making channels. The majority of congressmen had very little influence on the Buckley Amendment; the most important policy makers were selected congressmen, congressional staff persons, and HEW bureaucrats. The significant processes were not committee hearings and floor proceedings but House-Senate conferences, interoffice bargaining, "comment" filing and review, regulation drafting, and administrative enforcement.

The "lessons" to be learned from the Buckley Amendment experience are straightforward propositions. Hastily conceived and ill-considered legislation affords the greatest discretion to policy makers in the postenactment stages. Legislators who wish to maximize their control over the policies they legislate are thus counseled to approach floor amendment with caution no matter how significant and attractive the proposal appears. Laws which seek to establish individual rights via funding conditions place provision of those rights at the mercy of the dynamics in bureaucratic decision making. Legislators who intend to ensure the provision of individual rights they deem essential are advised to express their convictions in explicit legislation.

FOOTNOTES

1. Cong. Rec. (daily ed.), May 14, 1974, S 8067.

2. **Ibid.**, S 8066. (Unless otherwise noted all citations in this chapter are from Cong. Rec., May 14, 1974, S 8064–S 8087.)

3. "Buckley Describes How His Amendment Came Into Being," **Nation's Schools and Colleges** (January, 1975), p. 3.

4. Fec. S 8074.

5. **Ibid.**

6. Sarah C. Carey, **Students, Parents, and the School Records Prison: A Legal Strategy for Preventing School Abuse**, quoted in J. William Roux and Stuart A. Sandow, **Children, Parents, and School Records** (Columbia, Md.: National Committee for Citizens in Education, 1974), p. 25; Diane Divoky, "Cumulative Records: Assault on Privacy," **Learning Magazine** (September, 1974), p. 12; George F. Sanders, "Does Your Registrar's Computer Invade Your Privacy," **College Monthly** (September, 1974), p. 38; Divoky, "Cumulative Records," p. 12.

7. Samuel Warren and Louis Brandeis, "The Right to Privacy," **Harvard Law Review** (March, 1890), quoted in Samuel H. Hofstadter, **The Right of Privacy** (New York: Central Book Company, 1964), p. 193.

8. Carl Marburger, quoted in Charles M. Wilson and Robert Olds, **Student Records** (Westerville, Ohio: School Management Institute, 1975), p. 9.

9. Divoky, "Cumulative Records," p. 10.

10. Alan F. Westin, **Privacy and Freedom** (New York: Atheneum, 1967), p. 247.

11. Roland Liebert, **Problems in Student Rights and Freedoms** Washington, D. C.: National Student Association, 1971), p. 124.

12. Carey, **Students, Parents, and the School Records Prison**, p. 24.

13. Cong. Rec., S 8075; 8082; 8066.

14. Unless otherwise noted, the sources for this section are private interviews with the following: staff assistant to Senate-House conference for the Buckley Amendment; and staff counsel to congressional education subcommittee, Capitol Hill, April, 1975.

15. John F. Morse, letter to House-Senate confereees, May 31, 1974.

16. Hope Eastman, Associate Director, American Civil Liberties Union, letter to House-Senate conferees, June 24, 1974, p. 2.

17. John Matthews, "Pupil Record Law Still Drawing Fire," **Washington Star-News**, November 11, 1974, p. 1.

18. Cheryl M. Fields, "Student Rights vs. Confidential Files," **Chronicle of Higher Education,** October 7, 1974, p. 4.

19. "Associations Request Delay in Implementing Privacy Legislation," **Higher Education and National Affairs,** October 11, 1974, p. 1; the following organizations joined ACE in making the request for the delay: the Association of American Colleges, the National Council of Independent Colleges and Universities, the Association of American Universities, the American Association of Community and Junior Colleges, and the National Association of State Universities and Land-Grant Colleges.

20. **Ibid.**

21. John F. Morse, memorandum from the American Council on Education, November 21, 1974.

22. **Ibid.**

23. John Kwapisz, "Questions About and Objections to the Buckley Amendment––and Responses," undated, p. 1. (Unless otherwise noted, the remaining citations in this chapter are from the Kwapisz memorandum, pp. 1–10.)

24. John Kwapisz, private interview, Dirksen Senate Office Building, Washington, D. C., March 25, 1975.

25. Karen J. Winkler, "Congressman, Colleges Seek Ways to Delay Giving Students Access to Records," **Chronicle of Higher Education,** November 25, 1974, p. 5.

26. "Joint Statement in Explanation of Buckley-Pell," December 13, 1974.

27. Larry Gladieux, interoffice memorandum, College Entrance Examination Board, January 6, 1975.

28. John Kwapisz, private interview, Dirksen Senate Office Building, Washington, D. C., March 25, 1975.

29. **Ibid.**

30. S.J. Res. 40, 93rd Congress, 2nd Session, sec. 438(b)(1)(e).

31. The Family Education Rights and Privacy Act of 1974 (as revised by the Buckley-Pell Amendment), Sec. 438(a)(1)(c). (Unless otherwise noted, all citations in this chapter are from the Act.)

32. The Family Education Rights and Privacy Act of 1974, Sec. 438(f) and (g).

33. Linda Lipton, Children's Defense Fund, letter to Casper Weinberger, October 24, 1974, p. 2.

34. "Buckley Aide Cites 'Domineering, Over-bearing Educators'," **Education Daily,** October 31, 1974, p. 2.

35. Thomas McFee, private interview, Department of Health, Education and Welfare, Washington, D. C., April 23, 1974.

36. Casper Weinberger, press statement, November 18, 1974.

37. **Federal Register,** January 6, 1975, p. 1212.

38. Carl L. Marburger, NCCE, letter to Casper Weinberger (Comment), March 4, 1975, p. 3.

39. American Civil Liberties Union, letter to Casper Weinberger (Comment), March, 1975.

40. Kathy Kelly, NSA, letter to Casper Weinberger, March 5, 1975.

41. Michael Liethen, School Records Task Force, private interview, Department of Health, Education, and Welfare, Washington, D. C., April 22, 1975.

42. John Kwapisz, "Questions About and Objections to the Buckley Amendment––and Responses," undated, p. 11.

43. Liethen interview.

44. Larry Gladieux, interoffice memorandum College Entrance Examination Board, January 6, 1975.

45. "Buckley Describes How His Amendment Came Into Being," **Nation's Schools and Colleges** (January, 1975), p. 3.

46. Michael Liethen, School Records Task Force, private interview, Department of Health, Education, and Welfare, Washington, D. C., April 22, 1975.

PUBLIC SUPPORT FOR PRIVATE HIGHER EDUCATION--THE CURRENT STATUS AND POSSIBLE IMPLICATIONS

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"There is no such thing as a private college or university." With this provocative sentence, Dr. John R. Silber, President of Boston University, opened an article in the May 1975 **Atlantic Monthly** entitled "Paying the Bill for College--The Private Sector and the Public Interest." Dr. Silber's premise is that inasmuch as private colleges and universities are open to the public, serve public needs, and most emphatically are influenced by public deliberations, they are not private. He would prefer that other terminology be used, suggesting as alternatives "independent and state" or "privately sponsored and tax-payer sponsored." Perhaps these terms would be more descriptive, but I find them generally open to the same kind of criticism which Dr. Silber made to the public and private characterization. His main point in the article was that, since no college or university is private, it is appropriate for the state to support all institutions of higher education and that as a result the state would be financially better off and perhaps educationally better off than if it supported exclusively public higher education. Still, the fact is that the minute this happened in any significant degree, the label "privately sponsored" would not be wholly accurate and the characterization "independent" would not be accurate at all because, as has been pointed out on many other occasions, the receipt of public funds inevitably costs the otherwise private institutions a significant part of their independence. Apparently no characterization yet suggested is completely accurate.

Be that as it may, what can be properly said about "Public Support for Private Higher Education--The Current Status and Possible Implications"? First, it is clear that there is a very substantial support in this country for state aid to private education at the elementary and secondary levels. It is fair to say, I believe, that campaigns for such assistance are being pressed by the religious organizations operating schools, although during the time of severe tension over desegregation of the public school systems of the South similar support also came from persons interested in private, non-sectarian schools which were planned to operate under a segregated pattern.

There have been and are also campaigns in most, if not all, states for increased public support of private higher education; and such support has generally been increased as the depressed economy has encouraged students to attend less costly state colleges and universities. The clamor for this assistance is not likely to decrease in the near future, and pressures in legislatures to provide additional state support for private education will undoubtedly continue to increase.

What are the possibilities for success? First of all, they are greater for secular institutions than sectarian ones; and within the sectarian category, they are apparently greater for private sectarian colleges and universities than they are for private sectarian elementary and secondary schools. The latter, however, we are not concerned with at this conference except insofar as judicial decisions involving them bear upon private higher education.

Permit me to make this flat prediction at the outset. At the moment, I think that the only really substantial problems in getting public support for private higher educational institutions which are truly secular in nature are political ones. Can a legislature be persuaded to provide assistance in whatever form to private higher education at all? Certainly, there will be serious opposition from state schools. After all, the "pie" is at any given moment only so large, and if there are additional diners, then the slices of any given "pie" for individuals must inevitably be smaller. Whether the "pie" can be made larger is, of course, highly questionable at the moment.

Similarly, if for constitutional or other reasons public support for private higher education should be proposed only for secular institutions, would sectarian ones support the effort? Would they remain neutral or would they oppose it? To illustrate the possibilities, although assistance to building programs can apparently be constitutionally provided to both secular and sectarian (or at least church-related) institutions of higher education, the United States Supreme Court has yet to speak definitively on the question of tuition grants or tuition reimbursement programs at the level of higher education. The question is now before the Court, and if it should rule against tuition grant or tuition reimbursement programs for sectarian institutions, could a legislature be persuaded to enact such a program which would apply only to students attending private, non-sectarian institutions of higher education? I am confident that in most areas the political problem would be insurmountable.

Beyond this political barrier, I wonder about the applicability of the equal protection clause to such a program. Would the Supreme Court sustain a tuition grant or tuition reimbursement program in the face of an attack based on the equal protection clause of the Fourteenth Amendment if such a program were available only to persons attending public colleges and universities and non-sectarian ones?

In 1973 the Court was faced with the argument that even if the Pennsylvania tuition plan under attack were held unconstitutional under the Establishment Clause, it was nevertheless severable and that, being severable, tuition grants could be made to students in private non-sectarian institutions.[1] That being so, the argument went, equal protection demanded that similar payments also be made to students in sectarian institutions. The Court was unpersuaded, at least by implication indicating that had the statute been applicable only to students in non-sectarian schools it would not have run up against the barrier of the equal protection clause. But the issue has not received full-blown treatment, and if any state legislature ever has the courage, or is foolhardy enough, to try it, the question will most certainly be presented vigorously.

Very roughly, what is the situation today with respect to public support of private higher education? In 1960, only a few states supported private higher education. In 1970 all but fourteen did, mostly with student aid programs but some with direct grants to schools.[2] I believe it is a safe bet that very few of the fourteen holdouts in 1970 are not supporting private higher education today. During this same time, with the high demand for higher education there was a massive build-up in the number of two- and four-year colleges. It became definitely a status symbol for a community of any size at all to have its own unit of higher education. As a result, whereas in 1950 approximately 50 percent of our college students were in public institutions and 50 percent in private, in 1970 over two thirds were in public institutions of higher education and less than one third in private.[3] The figures are undoubtedly worse today.

What then are the prospects for private higher education? The possibilities seem to me to be five in number: (1) close many such schools; (2) go public, become parts of established university systems; (3) remain private and become enclaves for wealthy, those who can afford to pay whatever tuition must be charged; (4) increase in significant ways endowment from private sources (obviously this is not a choice available to all private schools); and (5) obtain substantially increased public support.

We are most immediately concerned with the fifth possibility. The political problems have been mentioned. What are the legal problems? In any given situation there may be state constitutional problems, most of which would be parallel to the federal ones. Many states, however, in addition to equal protection, establishment, and free exercise clauses, have provisions inhibiting state aid to the private sector. It may take constitutional amendments to remove this type barrier, but I am assuming that these matters can be resolved.

What about the federal problems? I think the equal protection argument is at least theoretically present. It has been presented by respectable authority, and although the Court so far has evidenced no enthusiasm for it, there is always a possibility of change.

The major debate, to date, has been related to the Establishment Clause of the First Amendment.[4] There are many cases, and they are not easy to synthesize. I once heard it said concerning a particular series of developments that "anyone who is not confused by what is going on is not thinking clearly." That may well be the situation in this area today.

My last serious look at this problem was at a time when **Everson**,[5] **McCollum**,[6] and **Zorach**[7] were the leading cases. Later I had a mild flurry of interest when **Engel** v. **Vitale**[8] was handed down, but on the whole I have not spent any serious time with this since I was working on a church/state problem before the Supreme Court of Appeals of Virginia back in the mid-1950s.[9]

I find that there are whole new sets of cases, one in 1971, another in 1973, and now a starter in 1975 with two more to come during the next term of court. In 1971 the Supreme Court of the United States in **Lemon** v. **Kurtzman**[10] had before it Rhode Island and Pennsylvania programs reimbursing parochial schools and teachers for the costs of teaching secular subjects. In holding these particular programs unconstitutional a three-pronged test was established: (1) was there a secular purpose; (2) did the program have a primary effect that neither advanced nor inhibited religion; and (3) did it create risk of excessive entanglement of government with religious affairs? Without going into detail, it was held that although the first test was passed, the third was not, and it was therefore unnecessary to consider the second. In partial support of the result, however, the Court said: "The process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils in primary schools particularly."[11] Mr. Justice White in dissent suggested that the argument that college students were more mature and therefore more resistant to indoctrination was simply make weight. In commenting on this the late Professor Paul Kauper of Michigan said, "Church colleges, unlike parochial schools, do not have a predominant purpose of religious indoctrination. Rather their principal purpose is to provide a quality secular education."[12] I note these things at this point because of their bearing later in the discussion.

The same year, 1971, in the face of the **Lemon** decision,[13] the Court held that federal aid for the construction of college and university facilities was constitutional.[14] It distinguished the **Lemon** case on the ground that:

> . . . (a) there is less danger here than in church-related primary and secondary schools dealing with impressionable children that religion will permeate the area of secular education, since religious indoctrination is not a substantial purpose or activity of these church-related colleges, (b) the facilities provided here are themselves religiously neutral, with correspondingly less need for government surveillance, and (c) the government aid here is a one-time, single-purpose construction grant with only minimal need for inspection. Cumulatively, these factors lessen substantially the potential for divisive religious fragmentation in the political arena.[15]

In 1973 the Court faced another series of church/state cases. In **Hunt** v. **McNair**,[16] the Court sustained a South Carolina statute which authorized construction aid for private institutions of higher education. The statute, said the Court, did not foster an excessive entanglement, deciding as it had in the **Tilton**[17] case two years earlier and

finding that the education provided was not sectarian oriented and that there was little or no evidence that this kind of aid would advance religion.

In the state cases that same year, **Committee for Public Education and Religious Liberty** v. **Nyquist,**[18] **Sloan** v. **Lemon,**[19] and **Levitt** v. **Committee for Public Education and Religious Liberty,**[20] the Court struck down repair grants, tuition reimbursements, tax deductions, and reimbursement of expenses of the cost of administering state mandated exams as being unconstitutional, this time placing its decisions on the second prong of the three pronged test, finding that all of these programs aided and advanced religion. In commenting on this in an article published shortly after his death in 1974, Professor Kauper, after stating that state aid to private elementary and secondary education was obviously going to be extremely difficult, said:

> As to church-related colleges, the situation is more ambiguous. Assistance may be extended to these institutions under general laws applicable to all colleges provided that the college's program is viewed as substantially secular in character and that appropriate safeguards are employed to prevent the use of public funds to support distinctively sectarian practices. Whether government may continue to make scholarship or tuition grant loans directly to students, regardless of the sectarian aspects of the college they attend, may now possibly be questioned in view of the holdings in **Nyquist** and **Sloan** invalidating tuition reimbursement schemes for parents sending their children to parochial schools. But the evenhanded neutrality concept and the importance of observing freedom of choice may be determinative where benefits go directly to college students under programs extended to students attending public and private institutions alike. Moreover, it is clear that the Court's thinking tilts in favor of church-related colleges whereas its thinking tilts against parochial schools. It seems unlikely, therefore, that programs like the GI program at the end of World War II or other current programs of a similar character will be held invalid even though a student in exercising his freedom of choice elects to go to a distinctively sectarian college.[21]

The Court's latest word on this subject was spoken on May 19 of this year. In **Meek** v. **Pittenger,**[22] the Court considered the question of the validity of Pennsylvania's statutes providing directly to all children enrolled in non-public elementary and secondary schools meeting Pennsylvania's compulsory attendance requirement auxiliary services and loans of textbooks acceptable for use in the public schools, as well as loans directly to non-public schools of instructional materials and equipment useful to the education of non-public school children. A majority of the court, including Justices Stewart, Blackmun, Powell, Brennan and Marshall, determined that the direct loan of instructional materials and equipment to non-public schools had the unconstitutional primary effect of establishing religion because of the predominantly religious character of the schools benefiting from the act, since 75 percent of Pennsylvania's non-public schools complying with its compulsory attendance law and thus qualifying for this aid are church-related or religiously affiliated. The Court said that the massive aid that non-public schools thus receive is neither indirect or incidental, even though such aid is ostensibly limited to secular instructional materials and equipment. The inescapable result is the direct and substantial advancement of religion.[23] The Court also held that the provision for auxiliary services such as counseling, testing, psychological services, etcetera was void as involving excessive entanglement.

The provision of the law providing for the loan of textbooks acceptable for use in the public schools was, however, deemed constitutional in light of **Allen** v. **Board of Education.**[24] Justices Stewart, Blackmun, Powell, Rehnquist, White and the Chief Justice concurred in this portion of the decision; Justices Douglas, Brennan and Marshall dissented relying upon the "divisiveness" argument which had been made in **Nyquist.**[25]

The Court reaffirmed the application of the three-pronged test so clearly stated in recent establishment cases. (1) The statute must have a

secular legislative purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) the statute and its administration must avoid excessive government entanglement with religion.

From all this it seems clear that for the immediate future, at least, public support of private elementary and secondary sectarian education is in for a rocky time. Public support of private higher education including sectarian schools at least for certain types of support, is in doubt; but by this time a year from now the matter should be further clarified. The Court has before it two cases, one from Tennessee[26] and the other from Maryland,[27] involving public support of private higher education. The Tennessee program is a straight tuition grant program; Maryland's is a program of direct support to private institutions of higher education.

Tennessee by statute created a straight tuition grant program available to students attending public and private sectarian and non-sectarian colleges and universities in Tennessee. The students received certificates of entitlement but no actual money, and the funds went directly to the schools in which they were enrolled. By statute, payments were limited to tuition and registration fees, but there was no restriction on how the schools could use the money so generated. Approximately 77 percent of the private schools eligible for participation in the grant program were so-called church-related schools. In the first year of the program, 84 percent of the funds disbursed to **private** colleges went to religiously affiliated ones, and 59 percent of the funds dispersed to **all** colleges went to religiously affiliated institutions. For the 1973–74 school year religiously affiliated institutions received 86 percent of the funds disbursed to **private** schools and 63 percent of the total disbursed to **both public and private** schools. The trial court declined in terms to follow the three-part test but instead concerned itself with drawing the line required by separation of church and state and differentiating between direct and indirect forms of aid. The court said:

> Keeping in mind the three main concerns embodied in the establishment clause of protection, three general conclusions flow from the foregoing analysis. First, properly restricted sovereign "aid" to a broad range of students, which incidentally and indirectly confers a benefit on church-related schools attended by some of those students, is not violative of the First Amendment because it is not actually aid and does not constitute "sponsorship" or "financial support." Second, direct sovereign aid to church-related schools is not unconstitutional if the aid is exclusively restricted to the secular function of these schools, provided that the two functions can be separated and that enforcement of the restrictions does not "involve" or "entangle" the sovereign in religious activity. Third, the courts are to look to the substance of a given program, not to the particular form or device utilized.
>
> Applying these guidelines to the facts in this case, we find the constitutional issue is simply resolved because the Tennessee statute does not pass muster under either of the primary distinctions . . .
>
> The Court is further of the opinion that the unconstitutional aspects of the statute and the program cannot be severed so as to save the Tuition Grant Program with respect to the non-sectarian colleges and schools . . .[28]

The Maryland case[29] involved the validity of a program of direct aid to private schools under varying formulae beginning with a dollar amount per graduate and ending with 15 percent of the average yearly expenditure for a student in a state college system. Substantial sums of money were involved. Originally eighteen private institutions were eligible, and only five of these were church-related. Of these five, one became defunct and another terminated its affiliation with the Methodist Church. The majority said, "The Establishment Clause clearly does not prevent any form of public aid or service to any church affiliated institution." The trial court then went on to apply the three-pronged test and found that this statute does not violate any portion thereof. It had a secular purpose; there was no primary effect of advancing or inhibiting religion; and there was

no excessive government entanglement with religion.

Senior Circuit Judge Albert V. Bryan dissented, saying:

> It is the **potential** use of the money which is the determinant to be looked to in appraising the constitutionality of State monetary aid to church-affiliated or church-related institutions . . . The legality of the money's utilization is not finally and conclusively resolved by the **actual** use of the funds, no matter how neutral, bona fide, or praiseworthy. It is the reasonable opportunity for sectarian application that is the gauge of the validity of the statute's particular beneficience.[30]

Both cases involve private higher education but they test different types of public support. Further, the percentage support to sectarian institutions is significantly different in the two, and for whatever reason the trial courts reached different results. The cases will be argued next fall, and presumably we will thereafter have a much clearer picture of where public support for private higher education stands.

Is there any substantial ground for hope for private sectarian, or, at least, church-related institutions of higher learning? I can suggest two things, the first of which has already been discussed. This is the Court's apparent lesser concern about aid to private higher education than to private elementary and secondary education. The Court has clearly distinguished the two on the bases of (1) the maturity or lack of maturity of the students involved, their impressionability or non-impressionability, and (2) the fact that the primary purpose of sectarian support of elementary and secondary schools is the indoctrination of religion whereas the primary purpose of sectarian support to private higher education is to provide a superior secular education. In future cases, emphasis on facts which support these propositions may well be decisive.

The other point has to do with the changing composition of the United States Supreme Court. On the Warren Court there was a built-in majority of "similar thinkers" consisting of Chief Justice Warren and Justices Black, Douglas, Brennan, and Marshall. While they obviously did not always agree on issues including those arising under the Establishment Clause, there were at least tendencies which made results perhaps more predictable. Chief Justice Warren is now dead; so is Mr. Justice Black. Justice Douglas will not be on the Court much longer, leaving Justices Brennan and Marshall, who can be expected to serve over the next few years. They and Mr. Justice Douglas seem to represent a hard-core absolutist approach to questions under the Establishment Clause. At the other end of the spectrum are Chief Justice Burger and Justices White and Rehnquist, who seem to be much less concerned about state aid to education generally. In the center, or at least in between, are Justices Stewart, Blackmun, and Powell, who obviously hold the balance of power right now. I have not done a definitive study on this, but I have a hunch that Mr. Justice Stewart will tend toward the Brennan-Marshall camp with the other two remaining roughly in the moderate area. An additional appointment to succeed Mr. Justice Douglas would presumably add great strength to the Burger-White-Rehnquist wing; and with Brennan and Marshall coming toward the end of their careers, Brennan because of age and Marshall because of health, it appears clear that the argument over public support of sectarian education is a long way from being over.

That brings me to the final question. Do we in private higher education really want public support? If the question is based upon the premise that we in private higher education will not survive without it, then I suppose we do. The Medical School at Case Western Reserve University, for instance, receives very substantial funds from both the federal and state governments. Federal funds by and large support research, and presumably the teaching function could continue in a reasonable way without it. On the other hand, the state funds

are directed to the teaching side of the program, and the dean and his assistants labor long and diligently to retain this vital support. I have been told by the Dean of the Medical School that presumably the school could survive in some fashion without state aid, but it would be a totally different educational offering. Our Law School, on the other hand, receives no state or federal aid, and at the moment we do not need it to maintain our financial stability. Obviously we could do many more things with additional support; but with support comes control, and I am not particularly interested in that. Of course, I may change my mind if applications drop dramatically and I am left with a large faculty and not enough students paying tuition to support it.

Let me return to Dr. Silber, with whom I started. He believes that the states have invaluable resources in the institutions of private higher education within their borders. He feels that the state of Ohio, for example, rather than increasing its state educational facilities at astronomical capital costs, should instead provide a subsidy for each Ohio student equivalent to the cost of instruction in the state institutions. The student could then take that subsidy and attend a state institution or a private one as he thought best suited his purpose. This would introduce into public higher education what Dr. Silber refers to as "the tremble factor," taking the idea from the economist, Paul Rosenstein-Rodan. The "tremble factor" relates to the knowledge of the results of failure. Dr. Silber says that all private institutions have it. They know what happens if their enrollments drop dramatically; they are in economic crisis. State institutions, on the other hand, he suggests, are not now subject to the "tremble factor." If their enrollments drop they will still receive appropriations from the state legislature. But having spent twenty-one of my academic years in public higher education, I know that this is not totally true. It is a fact, I believe, that for a year or so enrollment has a minor impact upon operations. But in developing and adopting a budget, state officials definitely contemplate certain enrollments; and if these are not met, and particularly if there are significant differences, state appropriations for future periods will be definitely affected. Furthermore, in these days and times when state revenues are not meeting expectations and therefore budgets must be cut immediately, administrators of public higher education have to be subject to the "tremble factor," although there is nothing that they can do immediately about the situation. So I am satisfied that the "tremble factor," although perhaps not as immediately effective as in private higher education, is nevertheless an element in the corporate life of public higher education.

Dr. Silber's point is that if state institutions were as subject to the "tremble factor" as are private institutions, the totality of higher education would be better because of the competition. If Dr. Silber's recommendations should be accepted, it would mean that in the state of Georgia, for instance, the University of Georgia School of Law would compete for state dollars with Emory University School of Law and Mercer University Law School. The schools would be even more competitive in their academic programs than they are because their financial support would depend directly upon the number of students they enrolled. That school, or those schools, which did not compete successfully, would lose its lifeblood.

Public support does make sense as an alternative to extinction and as an alternative to the outlay of vast capital expenditures for new state institutions. This latter point, however, may be more theoretical than real now since the state educational building programs have by and large been completed and we are stuck with duplicate facilities. But for whatever reason public support may come, it must be remembered that with it comes control or partial control and, beyond that, with it may well come the characterization of acts of otherwise private institutions as state action within the meaning of the Fourteenth Amendment. The costs, in other words, must be counted.

Presumably, society benefits from alternative types of programs in higher education. The variety of alternatives, I suggest, must inevitably be reduced if any significant control is exercised by the state over private higher education.

My ultimate conclusion is that public support for private higher education can be obtained; the political and legal problems can be overcome. But in the end, the question remains: "Do we really want it?"

FOOTNOTES

1. **Sloan** v. **Lenman,** 413 U.S. 825 (1973).
2. 4 Education Commission of the States, Higher Education in the States, no. 1 (1973).
3. See McFarlane, et al., **State Aid for Virginia's Private Colleges?** 2 J.L. & Ed. 593 (1973).
4. "Congress shall make no law respecting an establishment of religion . . ." Constitution of the United States of America, Amendment I.
5. **Everson** v. **Board of Education,** 330 U.S. 1 (1947).
6. **McCollum** v. **Board of Education,** 333 U.S. 203 (1948).
7. **Zorach** v. **Clauson,** 343 U.S. 306 (1952).
8. 370 U.S. 421 (1962).
9. **Almond** v. **Day,** 197 Va. 419 (1955).
10. 403 U.S. 602 (1971).
11. **Id.,** at 616.
12. Kauper, **Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases,** 13 Ariz. L. Rev. 567, 585 (1971).
13. N. 10, supra.
14. **Tilton** v. **Richardson,** 403 U.S. 672 (1971).
15. **Id.,** Headnote 5 at 673.
16. 413 U.S. 734 (1973).
17. N. 14, supra.
18. 413 U.S. 756 (1973).
19. 413 U.S. 825 (1973).
20. 413 U.S. 472 (1973).
21. Kauper, **The Supreme Court and the Establishment Clause: Back to Everson?,** 25 C.W.R. L. Rev. 107, 127 (1974).
22. _____ U.S. _____, 95 S. Ct. 1753 (1975).

23. Id., see headnote 1.

24. 392 U.S. 236 (1968).

25. N. 18, supra.

26. **Americans United for the Separation of Church and State** v. **Dunn,** (M.D. Tenn. 1974), 384 F. Supp. 714.

27. **Roemer** v. **Board of Public Works,** (D. Md. 1974), 387 F. Supp. 1282.

28. N. 26, supra, at p. 720.

29. N. 27, supra.

30. N. 27, supra, at 1298.

CURRENT LEGAL ISSUES IN FACULTY EMPLOYMENT

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When I discussed the possibility of addressing this august body of educators with Dr. Young and then began to think of what I could say, I could not help but recall the words of James R. Adams, Deputy Attorney General of Pennsylvania. In a speech delivered to "The Study Commission of the Council of Chief State School Officers," Jim Adams remarked that he wasn't sure how easily a lawyer would fit in with a group of eminent academicians. However, Jim recounted William Buckley's comment that "the academic community has in it the biggest concentration of alarmists, cranks and extremists this side of the giggle house" (William F. Buckey, Jr., **On The Right,** January 17, 1967). Jim then came to the well reasoned conclusion that the education and legal professions attract the same kind of people, and I tend to agree with his conclusion.

I have been associated in a professional relationship with the academic community since before I graduated from law school. I have represented at sometime in varying capacities a school board, a community college, and a state university; and in my present position in the Office of General Counsel to the State Board of Education we deal with all levels of the state education system. I have had the opportunity to ligate cases in such areas as student rights, desegregation, reduction of faculty staff, faculty non-renewals, terminations for cause, denials of tenure, and even one case concerning a person that was refused employment. In all of my associations with educators I have come to know them as good people; but, for the most part, educators are obviously untrained in the law. Educators need to have some familiarity with the law in order to properly conduct the public's business of education. One way of obtaining such familiarity with the law is attendance at programs such as this program. Although I have no intention of making lawyers out of you, it gives me great pleasure to appear here today, because the highest calling of the legal profession is the practice of preventive law. Hopefully, what you learn today will be of assistance to you in preventing your involvement in legal problems.

Due to the broad spectrum of the topic Dr. Young so kindly provided me, my remarks will be couched in general terms this morning in order to give you a broad overview of the current legal issues involved in faculty employment.

I. Initial Employment

Legal issues concerning faculty employment arise from the first contact between an applicant for a faculty position and the educational institution's representative. I used to think that the only troubled time in faculty employment was when a faculty member was terminated or non-renewed, but having recently defended an insti[illegible] and a faculty member in a case brought by an unsuccessful applicant for a position I assure you they arise long before that.

It is my understanding from Dr. Young that within the past several years you have had a program on Title IX and affirmative action, so I will touch only briefly on the area of federal laws and jurisdiction. I'm sure that all of you know that employment of faculty and staff must be based upon the qualification of the applicant without regard to sex, race, creed, or color. I would like to

mention what I consider to be a major problem area in this regard, and that is the overlapping of federal enforcement jurisdiction. At present several federal agencies exert jurisdiction into equal employment opportunities in higher education: The EEOC under Title VII of the Civil Rights Act of 1964 as amended in 1972 by Public Law 92-261 §2; the Wage and Hour Administration of Department of Labor under the Equal Pay Act as amended in 1972 by Public Law 92-318; and the HEW under Title IX of Higher Education Amendments of 1972 and affirmative action by Executive Order 11246 (1965) as amended by Executive Order 11375 (1967). The advent of civil rights enforcement on the American college and university campus is proceeding at a rapid and unpredictable rate with a predictable lack of uniformity among federal agencies. At the present time, the best guideline is but a rule of thumb--look to and act upon the qualifications of the individual.

When the educational institution solicits applicants, the description of the position, salary range, qualifications, and tenure or non-tenure earning status of the position should be clearly stated. In the interview and collection of background information process on a likely prospect I suggest getting as much information from as many sources as possible. The initial decision to employ or not to employ is an important decision, and it should be an informed decision. It is substantially easier to reject an applicant for employment than it is to terminate or non-renew an unsatisfactory employee. When discussing a position with a prospective employee, do not promise the employee more than you are authorized to offer, because statements that are made and not met may later result in litigation.

In regard to the job interview and collection of background information, a current legal issue in faculty employment concerns charges of slander, libel, or imposition of a stigma arising out of faculty discussions on a person's background. The case I mentioned earlier when I said that problems began with initial contact with an applicant was a slander case which came about as a result of what the plaintiff claimed to be a remark about her moral character, **Drake** v. **Bizot**, Circuit Court of Duval County, Florida, No. 74-5518. Luckily, we were successful in getting a directed verdict, but several issues were raised in that case which are worthy of mention. The purported conversation took place between a faculty member and department chairman; and although we received no ruling, we asserted that the conversation carried a qualified privilege. We based our assertion upon a line of cases holding essentially that a verbal communication is privileged when made in good faith upon a subject in which a person has an interest, right, or duty, if made to a person having a corresponding interest, right, or duty upon a proper occasion and in a proper manner and not so made as to unnecessarily injure another: **Wolfson** v. **Kirk**, 273 So.2d 774; **O'Neal** v. **Tribune Co.**, 176 So.2d 535; and **Loch** v. **Geronemus**, 66 So.2d 241.

My good friend, Clarence Boswell was more successful in getting this point resolved in **Roberts** v. **Lenfesty**, 264 So.2d 449. In the **Roberts** case a junior college president was alleged to have made a slanderous remark about an applicant for a position. In that case the court found that the statement was made during a faculty meeting and that it was a privileged statement. (See also **Barr** v. **Matteo**, 360 U.S. 564.) I suggest to you in this regard that in your interviews and in receipt of background information you confine your communications to the privileged area.

The next step of the faculty employment relationship--the formal contract between the institution and faculty member--is as important as any I can think of. A formal written contract between the institution and faculty member is an absolute essential. Any contract with a faculty member should contain, at a minimum, provisions relating to the following matters:

1. The exact period of the contract, including a beginning and ending date if the contract is an annual contract.

2. The amount of compensation.

3. Specification of the duties to be performed including a clause stating that the head of the institution may assign duties.

4. The qualifactions of the faculty member which are required as a minimum for the position for which the individual is employed.

5. Statement that the contract shall not operate to prevent the discontinuance of the position.

6. Statement that, if the contract is an annual contract, there is no assurance or expectancy of employment beyond the stated contract period, or, if the contract is a tenure contract, that the contract is subject to cancellation for cause.

7. Statement that all laws, rules, regulations, and policies of the state and institution are incorporated by reference into the contract and that the parties agree to be bound thereby.

8. Statement that the written agreement constitutes the entire agreement between the parties and that the agreement may be modified only in writing and must be executed by both parties.

While these provisions are not exclusive of what a contract should contain, a firm contract along these lines will work to your future benefit.

II. During Employment

There are a number of issues that could be discussed about faculty employment during the actual employment period, such as collective bargaining, if you are in a state that permits it (but that is a subject in itself). I believe the one thing that cannot be impressed upon educators enough is the need to make fair and accurate evaluations of faculty during this stage of employment. Faculty evaluations serve a dual function to educators and a separate function to lawyers. Faculty evaluations serve to aid the faculty member to know where improvement is needed, and they serve to aid the administration when it comes time to terminate or non-renew a faculty member. Moreover, they serve an evidenciary function with lawyers. The kind of case an attorney really likes to defend is one where the faculty member is employed for several years, has satisfactory evaluations in his personnel file and is then discharged because of incompetency. Do not play the part of the nice guy in making an evaluation, as such an evaluation will only serve to hurt you and the faculty member.

One of the areas recently a subject of litigation is the right of faculty members to have unfavorable memoranda removed from their files. In **Collins** v. **Wolfson,** 498 F.2d 1100, several instructors brought suit to have unfavorable memoranda removed from their files. The Fifth Circuit Court held that the lodging of unfavorable memoranda, **without more,** in a faculty member's file gives rise to no constitutionally based grievance. The mere existence of the memoranda, **without more,** neither stigmatizes nor disgraces a faculty member so as to deprive him of a constitutionally protected interest. However, if the unfavorable memoranda is utilized, the faculty member must be given the opportunity to clear his name. This point was made clear by the limiting words of the Fifth Circuit and in the decision of the Eighth Circuit Court of Appeals in **Willner** v. **Minnesota State Junior College Board,** 487 F.2d 153, wherein it was held that a faculty member charged with racism and subsequently non-renewed was entitled to a hearing to clear his name.

III. Suspension, Termination, and Non-renewal

The court decisions that have been rendered in recent years have brought about vast changes in our educational institutions, particularly in regard to the protection of due process rights of faculty members. Unquestionably, the most litigated area and highest concentration of legal issues in faculty employment falls in the area of terminations and non-renewals.

In speaking of suspension, terminations, and non-renewals, the stepping off point is an examination of your state's tenure laws and the particular faculty member's contract status. The initial determination to be made is whether the

person is tenured, is an annual contract employee in a tenure state, or is an annual contract employee in a non-tenure state. If the person is on annual contract in a non-tenure state, a further examination of local rules, policies, or understandings which might create a defacto tenure relationship between the employee and institution is required. This initial determination of the legal relationship of the individual to the institution has important due process implications.

What is due process? Section I of the Fourteenth Amendment to the Constitution of the United States provides essentially that no state may deprive a person of life, liberty, or property without due process of law. The fundamental requisite of due process of law is the opportunity to be heard. The United States Supreme Court in **Board of Regents** v. **Roth**, 408 U.S. 564, stated, "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property."

Accordingly, if a person is entitled to procedural due process, either a property interest or a liberty interest must be at stake. The terms property and liberty are not limited to a few rigid technical forms but include a broad range of interests. **Board of Regents** v. **Roth**, supra, and **Perry** v. **Sindermann**, 408 U.S. 593.

A property interest may be said to be at stake where:

1. A person has tenure pursuant to law and contract (**Slochower** v. **Board of Education**, 350 U.S. 551);

2. An attempt is being made to terminate a person prior to the expiration of his contract (**Wieman** v. **Updegraff**, 344 U.S. 183); and

3. The person can establish an expectancy of a re-employment based upon mutual understandings (**Connell** v. **Higgenbotham**, 403 U.S. 207, and **Perry** v. **Sindermann**, supra).

Property interests are created and their dimensions are defined by existing rules or understandings, and a person must have a legitimate claim of entitlement to have a property interest. Moreover, the property interest must be a significant property interest (**Fuentes** v. **Shevin**, 407 U.S. 67).

A liberty interest may be said to be at stake where:

1. A charge is made against a person which might seriously damage his standing and associations in the community;

2. A stigma is imposed upon the person that forecloses his freedom to take advantage of other opportunities (**Joint Anti-Fascist Refugee Committee** v. **McGrath**, 341 U.S. 123; **McDowell** v. **State of Texas**, 465 F.2d 1342). (The simple fact of non-retention may make a person less attractive but does not amount to a deprivation of liberty);

3. A person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him (**Wisconsin** v. **Constantineau**, 400 U.S. 433; **Weiman** v. **Updegraff**, supra); or

4. The person alleges the termination or non-renewal is for constitutionally impermissible reasons (**Perry** v. **Sindermann**, supra).

If an institution's actions toward an individual are based upon stigmatizing reasons, then the individual is entitled to a hearing to refute the charges. Although the United States Supreme Court in **Roth** stated that the purpose of the hearing was to allow the person to clear his name and that the university remained free to deny future employment on other grounds, one must seriously question how free that freedom could be.

One of the lessons to be learned here is that if the person does not have a property or liberty interest at stake a statement of reasons and opportunity for a hearing are not required. A person employed

for a specified period of time is not entitled to a hearing or reasons if the contract runs its full course and there has not been created any expectancy of re-employment nor allegation of constitutionally impermissible reasons for non-renewal. If a person asserts that he is not being re-employed for some constitutionally impermissible reason or that he has an "expectancy" of re-employment, he should be accorded a hearing at which time he has the burden of coming forward and proving his assertions.

A current issue which we now have pending in cases before a federal three-judge district court and the Florida Supreme Court is whether a faculty member may be suspended without pay prior to a hearing, **Rogers** v. **Johnson,** No. 46398 (Fla.) and **Mattix** v. **School Board of Nassau Co.,** No. 73–307–Civ. J–S (USDC, M.D., Fla.). Plaintiff's counsel has conceded that the faculty member may be suspended, but the controversy rages over the suspension of pay prior to a hearing. Florida law provides that a faculty member may be suspended without pay subject to a speedy hearing and reinstatement with back pay if the charges are not sustained, Section 231.36(6), Florida Statutes. We are, of course, taking the position that the faculty member may be suspended in accordance with the statute without violating the faculty member's due process rights. In this regard see: **Arnett** v. **Kennedy,** _____ U.S. _____, 94 S.Ct. 1633; **Board of Regents** v. **Roth,** supra; **Bell** v. **Burson,** 402 U.S. 535; **Boddie** v. **Connecticut,** 401 U.S. 371; **Cafeteria Workers** v. **McElroy,** 367 U.S. 886; **Fuentes** v. **Shevin,** 407 U.S. 67; **Goldberg** v. **Kelly,** 397 U.S. 254; **Morrissey** v. **Brewer,** 408 U.S. 471; **Pordum** v. **Board of Regents of the State of New York,** 491 F.2d 1281; **Snidach** v. **Family Finance Corporation,** 395 U.S. 337; and **Temple** v. **Bushel,** 500 F.2d 591. Since one case has been argued and the other set for argument, we are not speculating on the outcome.

Now that we all know what due process is and when a person enjoys the benefits of the due process clause, it is necessary to determine what the requirements of due process are. First, a short word about giving statements of reasons. If a statement of reasons for non-renewal is not required to be given, it should not be given. If because of state law, policy, or contract, reasons are to be given, then they should be given in confidential form and released to no one other than the concerned faculty member. Due process requires that before a person can be deprived of a protected interest he must be afforded an opportunity for some kind of a hearing, except for extraordinary situations where some valid government interest justifies postponing the hearing until after the event, **Boddie** v. **Connecticut,** 401 U.S. 371, **Goldberg** v. **Kelly,** 397 U.S. 254, **Bell** v. **Burson,** 402 U.S. 535.

The formality and procedural requisites for the hearing can vary, depending on the importance of interests involved and the nature of subsequent proceedings. **Boddie** v. **Connecticut,** supra, and **Goldberg** v. **Kelly,** supra. The standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter, and the circumstances involved, **Ferguson** v. **Thomas,** 430 F.2d 852 (Fifth Circuit, 1970).

Minimum procedural due process may be said to consist of the following:

1. Timely and adequate notice detailing the reason or causes for the termination in sufficient detail to enable the faculty member to show any error that may exist.

2. The faculty member should be advised of the names and the nature of the testimony of witnesses against him.

3. At a reasonable time after such notice and advice the faculty member must be accorded a hearing before a fair and impartial tribunal.

4. The faculty member must be accorded a meaningful opportunity to be heard in his own defense and to present his own arguments and evidence orally.

5. He must be accorded an opportunity to confront and cross-examine adverse witnesses.

6. He must be accorded the opportunity to be represented by counsel. (Counsel need not be provided, but the person must be allowed to retain an attorney if he so desires, **Powell** v. **Alabama**, 287 U.S. 45, and **Goldberg** v. **Kelly**, supra).

7. The faculty member has a right to have the hearing recorded and transcribed.

8. The decision must rest solely on legal rules and evidence adduced at the hearing and the decision maker should state the reasons for the determination and the evidence relied upon.

The position of the United States Court of Appeals, Fifth Circuit, as so clearly stated in **Ferguson** v. **Thomas**, supra, must be considered with regard to the instituting of the due process procedures:

> We doubt the wisdom of requiring the college to **initially** detail all of its charges in such cases. In the majority of terminations for cause many adversary matters would be best left unsaid for the future good of the instructor and the institution. **At the outset, the college need merely indicate that termination for cause is in the offing.** If the professor accepts the situation, so be it. If the professor challenges the termination, then the college should come forward with its statement of reasons and the above procedures thus commence. (Emphasis added)

In regard to due process hearings it should be noted that many decisions of faculty committees and administrators are but stepping stones to the courthouse door. Simply stated, faculty members are ill-equipped to conduct such hearings; and hearing officers should be utilized either to sit with a faculty committee if one is established to hear a case and rule on offers of proof, procedure, and legal issues or simply hear the matter independently as hearing examiners. Such utilization of a hearing officer could at least avoid the pitfall of failing to afford due process.

IV. Financial Exigency

The hottest legal issue in faculty employment right now is the dismissal of faculty for reasons of financial exigency. This is an issue which is neither well defined nor often litigated. Considering the ambiguity or non-existence of financial exigency provisions in most contracts, regulations, or policies, the lack of existing case law, and the conflicting interests of institutions and faculty, it appears likely that case law in this area will be developed if the present financial crunch continues. Thus, with a view toward preventive law, an important part of any tenure contract or termination policy is a provision for termination of faculty, both tenured and non-tenured, in the event funds are not available to meet payroll obligations.

The subject of financial exigency raises a number of issues regarding faculty employment. The primary issue concerns the authority of an institution or governing board to adopt regulations relating to the termination of contracts for financial reasons. It is generally accepted that the governing board of an institution has the power to enact regulations relating to terminations for financial reasons--**Johnson** v. **Trader**, 52 So.2d 333; 68 Am Jur 2d **Schools** § 168; 100 ALR 2d 1144. It is not well settled as to when a regulation may be invoked to terminate a contract.

Under what conditions may immediate termination of faculty occur? Although the cases are in conflict, I suggest that in the absence of statute, rule, or contract provision to the contrary, the lack of funds is not grounds for immediate termination, **Board of Public Instruction of Suwannee Co.** v. **Arnold**, 194 So. 334. Even with the existence of a law, rule, or contract provision, it may be difficult to secure an immediate termination in the midst of a contract, 68 Am Jur 2d **Schools** § 167.

How is it to be determined that a financial exigency exists? A rule or policy on financial

exigency must provide a fair procedure for the determination of the existence of a financial exigency, and any decision to reduce staff based upon financial necessity must be supported by substantial evidence, **Williams** v. **Board of Education of Lamar County,** 82 So.2d 549. A written definition of the meaning of financial exigency sufficient to justify termination of faculty is essential, although we must be mindful that no definition is sufficient to meet every contingency. A financial exigency must be demonstrably bona fide, **American Association of University Professors** v. **Bloomfield College,** 322 A2d 846.

In the rule-making process the governing board of the educational institution should establish procedures and objective criteria for the selection of faculty members to be laid off or terminated when it is required to reduce its staff for financial reasons. Generally speaking, the determination of such criteria is within the discretion of the board and will not be disturbed by the courts, **Collins** v. **Wolfson,** supra, and **Smith** v. **Board of Public Instruction for Pinellas County,** 438 F.2d 1209. In **Johnson** v. **Board of Regents of University of Wisconsin,** 377 F.Supp. 227, the court indicated that there exists no constitutional right to any specific process. However, I think here we can draw upon those decisions relating to the consolidation of faculty from desegregation cases to know that as a general proposition objective criteria must be developed for the selection of faculty on a systemwide basis. (**Smith** v. **Board of Public Instruction of Pinellas County,** supra; **Roth** v. **County Board of Education of Lincoln Co., Tenn.,** 391 F.2d 77; and **Singleton** v. **Jackson Municipal Separate School District,** 419 F.2d 1211).

A central issue that remains undecided in drafting a procedure for layoff in the time of a financial exigency is whether non-tenured faculty members are to be treated differently from tenured faculty. If tenured faculty are to be given preferential treatment, then recent hirings of women and minority groups may be adversely affected. An important consequence of Title VII of the Civil Rights Act of 1964 may be a basis to challenge the procedure of layoffs for reasons of financial exigency. The "last in-first out" seniority system may not stand up (see **Watkins** v. **United Steel Workers,** 369 F.Supp. 1221). Of course, on the other hand you may be faced with a reverse discrimination suit if you give preference to women and minority groups (see **DeFunis** v. **Odegaard,** 507 P.2d 1169, app. dismissed _____ U.S. _____, 40 L.Ed.2d 164). If you really want to catch flack from all fronts, cut across tenure lines and compare competencies of individuals (**Smith** v. **Board of Public Instruction of Pinellas County,** supra).

What responsibility does the institution have in relocating or retraining staff if academic programs are eliminated or consolidated? This should be included within an institution's regulations and may well be a subject of collective bargaining in those states that permit it. In the absence of any contractual agreement, policies or rules of the institution should be drawn to reflect that if there is any position available for which the individual is qualified, then the individual should be placed in that position. When positions subsequently become available, the institution should notify qualified, laid-off employees and provide them with the opportunity to apply for the position (see **Singleton** v. **Jackson Municipal Separate School District,** supra). There does not appear to be any obligation to retrain employees.

What procedural protections must be afforded members? Non-tenured faculty members' contracts may be non-renewable; but if they are deprived of any rights, they are entitled to procedural protection--e.g., where a policy provides for a shortened period of notice of non-renewal. A tenured faculty member must be afforded certain procedural rights prior to termination, **Collins** v. **Wolfson,** supra. In **Johnson** v. **Board of Regents of University of Wisconsin,** supra, the court held that due process requires that a tenured faculty member selected for termination have a fair opportunity to be heard on the question involved in the selection process, after he is identified for termination but before a final decision is made. The **Johnson** court held that minimal due process includes:

1. Furnishing faculty with written statement of basis of initial decision to layoff.

2. Furnishing faculty with a description of the manner in which the decision was arrived at.

3. Making disclosure of the information and data upon which the decision makers relied.

4. Providing faculty with opportunity to respond.

These are but some of the issues that are bound to surface in the layoff or termination of faculty due to financial exigency. A properly drawn contract and adequate rules of procedure will certainly aid in carrying educators through such layoffs.

Conclusion

The legal issues involved in faculty employment are weighty and numerous. I have attempted to hit as many of the current issues as possible, but by no means have I touched on all issues. I hope that what I have said today will be of assistance to you in the days to come.

LEGAL LIABILITIES OF ADMINISTRATORS—CIVIL RIGHTS LAWS AND ACTIONS IN TORT

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What Liabilities Do Administrators Incur Under Civil Rights Laws As Well As Actions in Tort?

The greatest concern to administrators at present is their possible **personal liability** under civil rights laws. Two recent U. S. Supreme Court cases and a recent New Jersey Superior Court case involve the personal liability of school officials under the 1871 Civil Rights Act. In February 1975 the Supreme Court decided **Wood** v. **Strickland,**[1] which was a landmark case regarding the scope of "good faith" immunity as a defense in an expulsion case. In January 1975 the Supreme Court handed down its decision in **Goss** v. **Lopez,**[2] a case involving suspension without a hearing. In April 1975 punitive damages were awarded by the New Jersey Superior Court against individual college officials in **Endress** v. **Brookdale Community College,**[3] a denial of tenure case. All of these cases involve charges of violation of students' or teachers' constitutional rights by educational administrators.

The civil rights law involved is the 1871 Civil Rights Act, 42 U.S.C. § 1983, which permits persons to bring actions against school officials for deprivation of civil rights under color of state law. It permits relief at law in the form of both compensatory and punitive damages. It also permits relief in equity in the form of injunctions (or reinstatement) and declaratory judgments.

"Good Faith" Immunity: Old Test and New Test

In the past administrators relied upon the **sovereign immunity** of the state as a defense against **personal liability** in school discipline cases. Under the old test, immunity protected an administrator from tort liability if the actions were taken in good faith and non-maliciously to fulfill official duties. Now, however, the new test includes in the concept of good faith the additional duty on the part of the administrator to know the **"unquestioned constitutional rights"**[4] of students or teachers.

Wood v. **Strickland** recognizes the common law tradition and public policy which accord school officials a qualified good faith immunity from liability for damages under § 1983, assuming, of course, that no malice is involved. However, the Supreme Court in **Wood** v. **Strickland** points out that the term "good faith" includes not only a **subjective** view of good faith but an **objective** view as well.

It is no longer enough that school officials are acting sincerely and with a belief that they are doing right; in addition, there must be an indication of objective good faith. That is, the actions of school officials must not disregard the students' clearly established constitutional rights, for in such case the school officials' actions cannot

"reasonably be characterized as being in good faith."[5]

This leads to the principal criticism of the Court's decision, which is that the school official will be held to a standard of conduct based not only on good faith "but also on knowledge of the basic, unquestioned constitutional rights of his charges."[6] Indeed, dissent in the case points out that the majority opinion "appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights."[7]

Is this a fair criticism? Has the Supreme Court given school officials reliable bench marks with regard to what a student's clearly established constitutional rights are? Or has the court left officials with what the dissent characterizes as "two cryptic phrases"—"settled, indisputable" and "unquestioned constitutional rights"?[8]

Other Concerns of Administrators

What amounts of money might be assessed personally against administrators in the form of damages? What kind of professional liability insurance might be forthcoming to insure administrators against such claims? What steps might be taken by administrators to provide due process and prevent lawsuits? Will evaluations of administrators by their superiors include an assessment of how successful administrators are at providing due process procedures and avoiding lawsuits?

Facts in Wood v. Strickland

Wood v. **Strickland** arose in the state of Arkansas, where two high school students claimed under the 1871 Civil Rights Act that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the local public high school. The students brought a lawsuit against individual members of the school board, two school administrators, and the Special School District of Mena, Arkansas.

The two high school students had spiked the punch served at a meeting of an extra-curricular school organization attended by parents and students. Eleven days later they admitted what they had done, and the principal suspended them from school for a maximum two-week period, subject to the decision of the school board. The school board was to meet on the evening of the same day that the students made their admission to the principal. He told the students that they could tell their parents about the school board meeting but that the parents should not contact any members of the board.

Neither the students nor their parents attended the school board meeting that night. The board voted to expel the students from school for the remainder of the semester, a period of approximately three months. Subsequently the school board agreed to hold another meeting on the matter, and one was held approximately two weeks after the first meeting. The students, their parents, and legal counsel attended this second session. The board was asked to forego its rule punishing the violation by such a substantial suspension. However, the board voted not to change its policy and, as before, expelled the students for the remainder of the semester.

Thus, there were two school board meetings which considered the expulsion of these students. The first was held on the evening of the day the students admitted to the principal what they had done and took place **without** the presence of the students, their parents, or legal counsel. By contrast, the second meeting, two weeks later, was attended by the students, their parents, and their counsel. At this second meeting a written statement of facts as found by the board at its first meeting was read, the students admitted spiking the punch, and leniency was asked of the board.

The majority opinion of the Supreme Court took note of the court of appeals' conclusion that the students were denied procedural due process at the first school board meeting and also the intimation that the second meeting may have cured the initial procedural deficiencies. However, the court of appeals did **not** reach a conclusion on this

procedural issue. The Supreme Court vacated the judgment of the court of appeals and remanded the case back to it for further proceedings consistent with the Supreme Court's opinion.

Immunity as a Defense: Past and Present

The Supreme Court in **Wood** v. **Strickland** came to deal with the definition of good faith immunity because the district court and the court of appeals, in earlier hearings of the case, had disagreed as to the definition of good faith immunity. The district court instructed the jury that a decision for respondents had to be premised upon a finding that petitioners acted with malice in expelling them and defined "malice" as meaning "ill will against a person--a wrongful act done intentionally without just cause or excuse."[9] The court of appeals disagreed. It held that specific intent to harm wrongfully was not a requirement for the recovery of damages. Instead, "it need only be established that the defendants did not, in the light of all the circumstances act in good faith. The test is an objective, rather than a subjective one."[10]

The Supreme Court essentially sustained the provision of the court of appeals with respect to the immunity issue. The Supreme Court pointed out that:

> The nature of the immunity from award of damages under Section 1983 available to school administrators and school board members is not a question which the lower federal courts have answered with a single voice. There is general agreement on the existence of "good faith" immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good faith standard.[11]

The Supreme Court then went on to cite some twenty cases[12] in the lower federal courts as examples of the general disagreement in those courts on the existence of a good faith immunity. Three of the examples are these:

> 1968--Immunity was extended to school board members and the superintendent of schools only to the extent that they could establish that their decisions were founded on "justifiable grounds."[13]
>
> 1970--Immunity was extended to action taken in good faith and in accordance with "long standing legal principle."[14]
>
> 1973--Immunity protecting university officials was described as one of good faith and the absence of malice where the facts before the officials "showed a good and valid reason for the decision although another reason or reasons advanced for non-renewal or discharge may have been constitutionally impermissible."[15]

This wide-range of language in the lower federal courts, purporting to define good faith immunity, apparently led the Supreme Court in **Wood** v. **Strickland** to believe that some attempt at clarification of good faith immunity by the Court would be helpful.

The Supreme Court briefly mentioned three of its own decisions dealing with the scope of the immunity protecting various types of governmental officials from liability for damages under § 1983:

> 1951--In a case essentially involving statutory construction, the Supreme Court concluded that there was no basis for believing that Congress in § 1983 intended to eliminate the traditional immunity of legislators from civil liability or acts done within their sphere of legislative action.[16]
>
> 1967--The Supreme Court again found that "the legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities" in enacting § 1983 . . . similarly, § 1983 did not preclude application of the traditional rule that a policeman, making an arrest in good faith and with probable cause, is not liable for damages,

although the person arrested proved innocent. Consequently, the Court said: "Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[17]

1974--Last year in the Kent State case, the Supreme Court said "it is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[18]

In **Wood** v. **Strickland** the Supreme Court, absent legislative guidance, relies on those same sources in determining whether and to what extent school officials are immune from damages under §1983. The Court thinks "there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."[19]

How, then, does the Supreme Court in **Wood** v. **Strickland** define good faith immunity? The Court finds that the appropriate immunity standard necessarily contains elements of both a "subjective" and an "objective" test of good faith. The Court states that:

> The official must himself be acting sincerely and with the belief that he is doing right.[20]

(This is the subjective test of good faith.)

> . . . **but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.**[21]

(This is the objective test of good faith.)

Supreme Court Holding in Wood v. Strickland

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he **knew or reasonably should have known** that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[22]

The Court goes on to note specifically that "such a standard" of conduct for school board members does not impose "an unfair burden" upon a person voluntarily "assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties."[23] Nor does the Court see the standard to be an "unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of §1983."[24] The Court emphasizes that it is **not** saying that school board members are "charged with predicting the future course of constitutional law."[25] Instead it states that "a compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[26]

In School Suspension or Expulsion Cases, What Are A Student's Clearly Established Constitutional Rights?

The Supreme Court responds that public high school students have **property** rights and **liberty** rights, as well as **procedural** rights while at school.

In January 1975 in **Goss** v. **Lopez**,[27] a suspension case, the Court discussed at some length the constitutional rights of students regarding

expulsion and suspension. It pointed out there that when a state establishes a school system, students have a **property** right as to that education which is protected by the due process clause of the Constitution.

The Court went on in **Goss** to observe that the due process clause also forbids arbitrary deprivations of **liberty**; that is, placing in jeopardy a person's good name, reputation, honor or integrity. Thus, in the **Goss** case the Court found it to be evident "that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred, immediately collides with the requirements of the Constitution."[28]

The **Goss** case involved a suspension for misconduct for up to ten days. The Court found in **Goss** that while a short suspension is a far milder deprivation than expulsion, the exclusion from the educational process is a serious event in the life of the suspended child. The Court went on to say, "neither the property interest in educational benefits temporarily denied or the liberty interest in reputation, which is also implicated, is so insubstantial that suspension may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."[29] Thus, **Goss** found that **suspension without hearing** unconstitutionally deprives students of **liberty** and **property** without affording them minimal **procedural** safeguards required by the due process clause. The Court found that procedural due process is required in cases of either suspension or expulsion.

In February 1975 in **Wood** v. **Strickland** the Court reminds us that "over the past thirteen years the courts of appeal have **without exception** held that **procedural** due process requirements must be satisfied if a student is to be expelled."[30] Critics of the **Wood** v. **Strickland** decision allege that there is no reliable answer to the question of what students' constitutional rights are, that this is a harsh standard, that school officials will now act at the peril of some judge or jury subsequently finding that a good faith reliance on applicable law was mistaken, and that administrators will be swept away in a torrent of successful lawsuits or damages under § 1983. Coupled with this criticism is the suggestion that current professional liability insurance available to administrators is wholly inadequate and that there is an urgent need to review present professional liability insurance coverage and generate proposals for expanded professional liability insurance. This latter suggestion, in my estimation, has some merit and will be discussed a bit later.

"Once it is determined that due process applies, the question remains what process is due."[31] The Court in **Goss** states that the interpretation and application of the due process clause is an intensely practical matter, but points out that there are certain bench marks to serve as guides.

> 1863——"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be **notified.**"[32]
>
> 1914——"The fundamental requisite of due process of law is the opportunity to be **heard.**"[33]
>
> 1950——"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by **notice** and opportunity for **hearing** appropriate to the nature of the case."[34]
>
> In 1975, in **Goss** v. **Lopez,** the Supreme Court said, "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given **some** kind of notice and afforded **some** kind of hearing."[35]

What Constitutes Due Process?

Specifically, with regard to **suspensions of ten days or less,** the Court found in **Goss** v. **Lopez** that due process would be achieved by the following procedure:[36]

1. The student should be given oral or written notice of the charges.

2. If the charges are denied, the student should be given an explanation of the evidence the authorities have and an opportunity to present his side of the story.

3. There need be no delay between the time "notice" is given and the time of the hearing. That is, in the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.

4. In most cases, notice and hearing should precede suspension or expulsion. However, there may be situations where immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers, or school officials, or damages property, may be appropriate; in such cases it would be reasonable to require notice of the proceedings to be sent to the (student or) student's parents within twenty-four hours of the decision to conduct them and require that a hearing be held with the student present within seventy-two hours of the student's removal from school.

With regard to **expulsions and suspensions of more than ten days,** the Court in **Goss** v. **Lopez**[37] implies that due process would be achieved by adding to the aforementioned procedure the opportunity for the student to:

1. Secure legal counsel.

2. Confront and cross-examine witnesses supporting the charge.

3. Call witnesses to verify the student's version of the incident.

Uppermost in this discussion is the assumption that previously the administrator has promulgated appropriate **rules** and regulations concerning the conduct at issue, along with **sanctions** for violations, and that these are **known** to the student.

Defense of Having Taken Advice of Counsel

Can administrators defend themselves in cases charging violations of constitutional rights on the grounds that they had been assured by counsel that their actions were legal? Exoneration from liability would be claimed on the basis of the affirmative defense of due diligence.

The Court of Appeals in the Fourth Circuit said "no" in a case on remand from the U. S. Supreme Court involving personal liability of directors of a community swimming pool who had unlawfully discriminated against black applicants for membership in violation of the 1866 Civil Rights Act.[38]

The court of appeals said due diligence is not a defense in this case since "due diligence has its genesis in the law of negligence."[39] This cause of action is based on an intentional tort, not on negligence. The court of appeals also pointed out that to accept "the argument that a corporate official may violate Sections 1981 and 1982 with impunity because he exercised due diligence by relying on advice of counsel about the meaning of the law would severely restrict the application of these statutes."[40]

The dissent in the court of appeals decision noted its belief that when one has done everything possible to assure that one's actions are proper and lawful, one lacks the personal guilt to impose personal liability whether the conduct is intentional or negligent.

Remedies Available in School Discipline Cases for Deprivation of Civil Rights

It is the possibility of compensatory and punitive money damages rather than the declaratory and/or injunctive relief, in cases such as these, which is of alarming and unique concern to individual administrators, for under the new test of good faith immunity an administrator may be personally liable for money compensation due students whose constitutional rights have been violated.

In the case of **Wood** v. **Strickland** the suit was filed by two high school students against individual members of the school board, two school administrators, and the Special School District of Mena, Arkansas. The suit sought both **compensatory** and **punitive damages,** in addition to declaratory relief and an injunction. If on remand it is determined that the students were denied procedural due process, the serious matter of compensatory and punitive money damages to be assessed against the administrators will have to be determined.

Goss v. **Lopez** was a class action suit brought by nine suspended high school students against various administrators of the Columbus Ohio Public School System seeking **non-monetary** relief--(1) a declaration that the Ohio statute permitting such suspensions was unconstitutional and (2) an order enjoining the officials to remove the references to the suspension from the students' records. The Court found the statute and implementing regulations to be unconstitutional. The requested injunction was duly granted, and the administrators were ordered to remove all references to such suspensions from the students' records.

Examples of Money Damages

Is there any way to estimate what might be the amount of money damages assessed against administrators as a result of suits based upon § 1983? A very recent decision in April 1975 in superior court in the state of New Jersey may indicate how money damages might be computed. In that case, **Endress** v. **Brookdale Community College**, the judge said, "Punitive damages are absolutely necessary to impress people in authority that an employee's constitutional rights cannot be infringed."[41]

The judge found that Endress was terminated three days before she would have gained tenure, an action which the judge believed was in retribution for an editorial she had written for the college newspaper, in which the Chairman of the Board of Trustees was accused of a "conflict of interest in regard to an award of a contract to purchase teaching equipment from a company headed by the chairman's nephew."[42]

In **Endress** the judge concluded that the college and six trustees "did violate the plaintiff's first amendment rights" involving free speech and freedom of the press. The judge awarded punitive damages in the amount of $10,000 each against the college president and six trustees, plus $10,000 compensatory damages, plus $10,000 in lawyers fees and $14,121 in compensation for lost salary, a grand total of just over $104,000 in damages and lawyers' fees.[43]

In the Kent State case[44] currently at trial, plaintiffs are suing the former Kent State University president, the former state governor, the Adjutant General of the Ohio National Guard, and individual officers and guardsmen, seeking to hold them personally liable for the deaths of four students and the wounding of nine other students by depriving them of the constitutional right to life and liberty. Plaintiffs may seek about $45,000,000 in actual and punitive damages.

Professional Liability Insurance

Obviously situations such as the **Wood, Goss,** and **Endress** cases ought not to happen in the first place, but they do. All administrators may make mistakes from time to time. What kind of professional liability insurance is available to administrators? A number of professional education associations and organizations currently are reviewing the insurance situation.

In general it has been found that most professional insurance policies indemnify the educational institution, association, or organization which in turn assures its members. A typical policy may cover civil cases only and not provide for the defense of criminal charges. It may reimburse attorneys' fees up to $5,000, but with 15 percent deductible. It may provide for the settlement of a claim with or without the consent of the individual administrator. It may cover such matters as libel, slander, or accidental injury or death of students but not provide legal expense coverage for loss of tenure suits or teacher

grievance cases. Compensatory damages may be covered up to $500,000 per individual; however, punitive damages may not be covered at all.

Of course, in the more usual tort case for damages, suit would be brought and any judgment taken would be against the college or university as employer rather than against the individual administrator personally. Even in that situation, however, if the individual administrator is found to have acted outside the normal discharge of his or her duties, or outside the normal scope of employment, or acted willfully, wrongfully, or with gross negligence, the individual administrator (rather than the employer) may be personally liable for damages.

For example,[45] New York State Education Law Section 3028 requires **defense** of, but **not** the payment of **awards** against, employees and applies to criminal as well as civil actions. However, Opinion of the State Comptroller 60–891 states that:

> It is further reasoned that in an action against a teacher or other school employee defended pursuant to Education Law Section 3028, if such defendant's position does not prevail in the courts, it would be indicative that he had not acted in the proper discharge of his duties; therefore, the school district could, in no wise be held liable.

Thus, where the administrator loses a case, not only the award but also the attorneys' fees, the expenses, and the court costs may have to be paid by the administrator!

Administrators are well advised to find out what kind of insurance coverage exists for them at their institutions. At the same time, various professional education associations are moving as expeditiously as possible to attempt to provide initial or expanded professional liability insurance coverage for educational administrators.

Present insurance policies should be improved to close the gaps just mentioned in the discussion of typical existing insurance coverage.

A group of professional education associations[46] has suggested that, in addition, "wrongful and negligent" acts liability coverage would be helpful. It should include coverage of all claims arising out of alleged violations of laws concerning civil rights, due process, equal protection, discrimination, etc. It should contain provisions such as the following:

1. It must insure the institution, board, board members and administrators.
2. The institution should be insured, not just reimbursed.
3. It should contain provisions for "prior acts."
4. Notice of occurrence should not be less than ninety days.
5. It should contain ample "discovery" of claims period.
6. It must cover wrongful or negligent acts, errors of omission or commission.
7. It must defend actions seeking declaratory judgments or injunctive relief.
8. It must defend actions arising out of contractual obligations.
9. It should permit some degree of flexibility by inclusion or exclusion.
10. It must defend criminal as well as civil acts.
11. It must cover payment of punitive damages.
12. Deductible amounts should be optional and reasonable.
13. It must require consent of insured before any settlement.
14. It should not exclude causes arising out of food service.
15. It should not contain a "failure to maintain insurance" exclusion.

How to Prevent Lawsuits

As must seem obvious by now, prevention is the best defense against losses of the kind discussed herein. Indeed, as mentioned earlier, evaluations of administrators by their superiors may include an assessment of degree of success in providing procedures to avoid lawsuits.

Educational administrators might consider the possibility of initiating and maintaining an ongoing **audit of litigation-prone situations** in their institutions. For example, a review could be done of procedures used in handling matters relating to both students and teachers. Relating to students would be procedures for admissions, suspensions, expulsions, determining when prior restraint shall be exercised over publication of student newspapers, formulating and enforcing grooming codes, handling conduct which disrupts classes, search and seizure, and operation of the placement office. Relating to teachers would be procedures relative to hiring, promotion, tenure, and termination.

After the initial review, deficient procedures could be modified and corrected. Thereafter, regular periodic follow-ups should suffice to keep procedures in line with recent court decisions. This kind of regular, systematic review probably already takes place at most institutions with regard to financial matters.

The audit should also include review of student and faculty **handbooks** to be sure that appropriate rules and regulations have been promulgated, along with sanctions for their violation, and to insure that affected persons have been sent such handbooks and other materials which will keep them informed of both their responsibilities and their rights.

To illustrate how such an audit of litigation-prone procedures might work, let us examine very briefly some recent court decisions in areas of concern to colleges and universities.

Students

Admissions

In **McCrary** v. **Runyon**,[47] private schools' policy of refusing to admit blacks solely because of their race violates 1866 Civil Rights Act, 42 U.S.C. § 1981, by denying blacks the same right "to make and enforce contracts . . . as is enjoyed by white citizens." Section 1981 prohibits the rejection of black applicants when their qualifications meet all other requirements for admission, and (race) is the only basis raised for their rejection.

Undercover Police Agents on Campus

In **White** v. **Davis**[48] a California court found in a taxpayers suit instituted by a university professor that undercover police activities at a state university by police agents violated freedom of speech and association. Police agents had enrolled as students and compiled information for police dossiers. The court found that such activities "will chill the exercise of the First Amendment rights."

Student Placement Offices

In **McDonald** v. **General Mills**[49] a state college was ordered by a federal district court in California to be made a party to a sex discrimination suit brought by a girl student against several business firms, because she utilized the college placement service in attempting to find a job. The graduate placement center had set up interviews and prepared the forms with "male/female" preferences. The suit was filed under Title VII of the 1964 Civil Rights Act, which prohibits unlawful employment practices by employers and employment agencies.

In **Kaplowitz** v. **University of Chicago**,[50] also under Title VII of the 1964 Civil Rights Act, a district court found that a law school's placement

office falls within the statutory definition of "employment agency." In that case the court held that the law school need not determine **beforehand** whether a recruiting law firm discriminates.

Teachers

Employing Unwed Mothers

In **Andrews** v. **Drew Municipal Separate School District,**[51] the Fifth Circuit Court of Appeals found that the school district rule against employing unwed mothers constitutes deprivation of due process and equal protection of the laws.

Equal Pay

In **Brennan** v. **Corning Glass Works**[52] the U. S. Supreme Court found that the Equal Pay Act of 1963 had been violated by the employer's paying female day inspectors less than male night inspectors. This case reaffirms the duty of employers to pay females and males equally for "comparable" work. Administrations which pay males and females differently should be prepared to document their claims that the work done is not "comparable."

Retirement Plans

In **Fitzpatrick** v. **Bitzer**[53] the Court of Appeals of the Second Circuit held that the Eleventh Amendment immunizes Connecticut's retirement fund, which is annually replenished by state funds, from liability for retroactive payments to state employees who were denied benefits on the basis of sex in violation of Title VII of the 1964 Civil Rights Act.

Conclusion

It appears that the next five to ten years will be a time of heavy testing of higher education students' and employees' individual rights under legislation such as the following: Title IX (effective July 21, 1975) of the 1972 Higher Education Amendments; Title VII of the 1964 Civil Rights Act, as amended in 1972; the Age Discrimination in Employment Act of 1967; the Equal Pay Act of 1963; Section 1983 of the 1871 Civil Rights Act; Sections 1981 and 1982 of the 1866 Civil Rights Act; plus various Executive Orders and state human rights laws--all in addition to the basic protections afforded individuals by the U. S. Constitution and various states' constitutional equal rights amendments. Cases initiated under such legislation may be facilitated by the 1974 Freedom of Information Act, 5 U.S.C. § 552.

The signs are clear that challenges will be and should be made against non-existent or inadequate due process procedures, against discriminatory practices, and against other denials of individual civil rights. Administrators not only may be challenged but also may be among the challengers, should they find themselves in situations where their own constitutional rights are denied.

It may be too late to prevent some lawsuits against poor past practices, but surely many costly suits could be avoided by thoughtful and careful reviews of questionable institutional procedures.

FOOTNOTES

1. **Wood** v. **Strickland,** 95 S.Ct. 992, (Feb. 1975).
2. **Goss** v. **Lopez,** 95 S.Ct. 729 (Jan. 1975).
3. **Endress** v. **Brookdale Community College, New York Times,** May 1, 1975, at 1 (New Jersey Superior Court, April 30, 1975).
4. See note 1 supra at 1001.
5. **Ibid.**
6. See note 1 supra at 1004.
7. **Ibid.**
8. **Ibid.**
9. See note 1 supra at 996, 997.
10. **Id.** at 997.
11. **Ibid.**
12. **Ibid.,** n. 7.
13. **McLaughlin** v. **Tilendis,** 398 F. 2d 287, 290–291 (CA7 1968) Cf. **Scoville v. Bd. of Ed. of Joliet Twp. H.S.,** 425 F.2d 10, 15 (CA 7), cert. denied, 400 U.S. 826 (1970).
14. **Kirstein** v. **Rector and Visitors of University of Virginia,** 309 F. Supp. 184, 189 (ED Va. 1970).
15. **Smith** v. **Losce,** 485 F. 2d 334, 344 (CA 10 1973) (en banc), cert. denied, 417 U.S. 908 (1974).
16. **Tenney** v. **Brandhove,** 341 U.S. 367 (1951).
17. **Pierson** v. **Ray,** 386 U.S. 547, at 554–5 (1967).
18. **Scheuer** v. **Rhodes,** 416 U.S. 232, 247–248 (1974).
19. See note 1 supra at 1000.
20. **Ibid.**
21. **Ibid.**
22. See note 1 supra at 1001.

23. **Ibid.**

24. **Ibid.**

25. See note 17 supra at 557.

26. See note 1 supra at 1001.

27. See note 2 supra.

28. See note 2 supra at 736.

29. **Ibid.**

30. See note 1 supra at 1001 n. 15 (which refers back to **Goss** v. **Lopez**, note 2 supra at 737 n. 8.)

31. **Morrissey** v. **Brewer**, 408 U.S. 471 (1972).

32. **Baldwin** v. **Hale**, 68 U.S. 223, at 223 (1863).

33. **Grannis** v. **Ordeon**, 234 U.S. 385, 394 (1914).

34. **Mullane** v. **Central Hanover Trust Co.**, 333 U.S. 306, 313 (1950).

35. See note 2 supra at 738.

36. **Id.** at 740.

37. **Id.** at 741.

38. **Tillman** v. **Wheaton-Haven Recreation Assn.**, 43 LW 2433 (CA4) 4/15/75.

39. **Id.** at 2434.

40. **Ibid.**

41. See note 3 supra at 1.

42. See note 3 supra.

43. **Id.** at 45.

44. See **Chronicle of Higher Education**, Vol. X, No. 15, June 9, 1975 at 2.

45. W. Hageny, Jr., **Education Law, 1972 Edition**, at 130–131.

46. Meeting in February 1975, Washington, D. C. of Association of Governing Boards (AGB), American Association of University Administrators (AAUA), American Association of Community and Junior Colleges (AACJC), American Association of State Colleges and Universities (AASCU), National Association of State Universities and Land Grant Colleges (NASULGC), and National Association of School Affiliates (NASA).

47. **McCrary** v. **Runyon,** 43 LW 2439 (CA4) 4/15/75.

48. **White** v. **Davis,** 43 LW 2415 (Cal. Sup. Ct.) 3/24/75.

49. **McDonald** v. **General Mills, Inc.,** et al., (DC Ed. Cal. 1974) DKT. No. S–2553, December 5, 1974 9EPD § 9868.

50. **Kaplowitz** v. **University of Chicago,** 43 LW 1077, (DC ND Ill.) October 22, 1974.

51. **Andrews** v. **Drew Municipal Separate School District,** 43 LW 2347 (CA5) 2/3/75.

52. **Brennan** v. **Corning Glass Works,** 94 S.Ct. 2223 (1974).

53. **Fitzpatrick** v. **Bitzer,** 43 LW 2529, (CA2) 6/2/75.